UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JOHNSON & JOHNSON,

Plaintiff,

v. 06 CV 7685 (RJS)

GUIDANT CORPORATION,

Defendant.

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New York, N.Y.
December 17, 2014
9:31 a.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Attorneys for Plaintiff
BY: HAROLD P. WEINBERGER, ESQ.
JOEL M. TAYLOR, ESQ.
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BY: WILLIAM S. OHLEMEYER, ESQ.
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AND
SHEARMAN & STERLING, LLP
BY: JOHN GUELI, ESQ.

(In open court; trial resumed)

THE COURT: Good morning. Have a seat. All right. Ready to proceed?

MR. WEINBERGER: Yes, your Honor.

BERNARD KURY,

called as a witness by the Defendant,

having been previously duly sworn, testified as follows:

CROSS-EXAMINATION

BY MR. WEINBERGER:

Q. Morning, Mr. Kury.

A. Good morning, sir.

Q. Mr. Kury, it's true, is it not, that Guidant was very concerned in evaluating the tentative proposal from Boston Scientific about the ability to obtain prompt antitrust approval; isn't that right?

A. Yes.

Q. And speed was critically important, wasn't it?

A. Yes.

Q. And when Boston made its definitive offer on January 8th, one of the things it touted was the fact that it had a binding definitive agreement with Abbott; isn't that right?

A. Yes.

Q. And the fact that there was an agreement in place with Abbott provided considerable comfort to Guidant along those lines, didn't it?

A. Yes.
Q. Now, Guidant had a board meeting on January 24th, 2006, to decide whether to terminate the J&J merger agreement; did it not?
A. I don't recall the date, but around that time that happened, yes.
Q. As of that meeting, putting aside the January 9th call with Mr. Deyo and Mr. Hilton, you did know that Johnson & Johnson was asserting, based on the facts known to it, that there had been a breach in the agreement; is that right?
A. Well, we had the memo from Deyo on the 23rd and also there was a follow up on the 24th, which we discussed yesterday.
Q. I think you told me yesterday that you understood that letter of the 23rd to be asserting a breach?
A. There was a strong smell of breach in it, yes.
Q. And you had not terminated the Johnson & Johnson/Guidant agreement as of that date; is that right?
A. No, that was happening after the board meeting.
Q. And you had never received any legal analysis in writing from Skadden or anyone else as to whether or not Abbott was permitted to get due diligence under the J&J Guidant merger agreement, had you?
A. Is your question a written advice?
Q. Yes.
A. No written advice.

THE COURT: Did you ever seek any advice from a litigator?

THE WITNESS: No.

THE COURT: With all due respect to Mr. Mulaney, he's not a litigator, right?

THE WITNESS: He is not a litigator.

THE COURT: And you had Johnson & Johnson writing a letter that had a strong smell of breach, which should conjure an image, and so you understood that that potentially could be a lawsuit, right?

THE WITNESS: Yes, but Mr. Mulaney may not have been a litigator, but his firm certainly had the resources --

THE COURT: Well, do you know whether Mr. Mulaney talked to anybody who was a litigator?

THE WITNESS: No, I did not.

THE COURT: Do you have a chief of litigation or did you have a chief of litigation at Guidant or somebody who was in responsible for litigation in-house?

THE WITNESS: There may have been someone who had primary responsibility for overseeing litigation, but that -- I can't even remember who it was, and it wouldn't have been a person that I think would have any particular insight into the process because they had not been involved in a discussion with regard to any of the agreements.

THE COURT: Okay. Go ahead.

BY MR. WEINBERGER:
Q. So just to follow up, at that point, you did not, either yourself or through Skadden, seek to do any additional analysis on this question; is that right?
A. Right. That's correct.
Q. And the reason you didn't is because you concluded that J&J's position was lame; isn't that right?
A. Yes.
Q. If you'd look at Kury Exhibit 83, the top e-mail is an e-mail from you to Mr. Mulaney; is that right?
A. Yes, it is.
Q. And in your e-mail, this is in response to the -- this is your reaction to the letter that you got from Mr. Deyo on the 23rd; isn't that right?
A. It is.
Q. And you say: "This is so lame, not only on the merits but also because J&J would never get the shareholder vote to approve its $71 offer." Do you see that?
A. I do.
Q. And you also thought that it was pointless? I think it says that in that letter. The reason you thought it was pointless and the reason you thought that J&J's offer would not win the approval of Guidant's shareholders is because there was a higher offer out there on January 8th from Boston Scientific; isn't that right?

A. Yes.
Q. And, in fact, that offer, as of the date of this e-mail, was an $80 offer?
A. Yes.
Q. And J&J's offer at that time was $71; is that right?
A. That's my recollection.
Q. Now, you aren't saying that even if Boston Scientific had not made that $80 or that $72 offer on January 8th, that shareholders wouldn't have approved the J&J merger agreement, are you?
A. I don't know that I was saying that. The facts at the time I made that -- sent that e-mail were that we had an $80 bid on the table.
Q. Now, your view that J&J's claim was lame and pointless would have been the same even if Mr. Deyo had written you that January 23rd letter at an earlier date; isn't that right?
A. Well, I can only speculate at that, and I guess I would speculate that if he had sent me the letter somewhat earlier, I would have followed the same practice. I would have sent it to Mr. Mulaney, gotten his advice and proceeded to respond to Mr. Deyo.
Q. You would have still concluded that it was lame, wouldn't you?
A. I had no reason to change that.
Q. Or pointless?

A. In light of the $80 offer, yes, the practicality of whether they could ever get a stockholder vote.
Q. Now, would you look at Exhibit 53, Kury.
THE COURT: Kury?
MR. WEINBERGER: Kury Exhibit 53.
Q. Could you identify this, Mr. Kury, as a termination notice that you sent -- second page is the termination notice that you signed and sent to Mr. Deyo on January 25th, 2006?
A. I see that, and I agree, yes.
Q. And that's two days after, there's no dispute, you were aware that J&J had sent you a letter saying that they believed the agreement had been breached; is that right?
A. That was a day or two, yes, two days after I received Mr. Deyo's letter.
Q. I want to read you a paragraph from the proposed findings that Guidant has submitted to the Court here. It's Paragraph 121, the piece of that paragraph it says as follows: "Had J&J notified Guidant prior to its acceptance of the Boston Scientific offer, Guidant could have pursued alternative courses of action such as seeking a declaratory judgment, rejecting the Boston Scientific offer or refusing to pay the $705 million termination fee."
It's correct, is it not, that Guidant could have done all of those things when it received -- or any of those things when it received Mr. Deyo's letter on January 23rd?

A. Well, I'm not familiar with the document you referred to. I don't think I ever read the proposed findings of fact, but it sounds as if those options would have been available, yes.
Q. And you also could have disclosed to Guidant shareholders, who were being asked to approve the Boston Scientific deal, that J&J was alleging a breach, couldn't you?
A. Yes, we had the capability of doing that.
Q. You never did that, did you?
A. Not that I recall.
Q. There's no securities filing, no proxy statement where you said that, is there?
A. Not that I recall, sir.
Q. And that's because you thought it was lame, right?
A. Yes.
Q. Can I just have one more area to briefly cover, Mr. Kury.
Isn't it correct that, at least from the time that Boston Scientific came on the scene, that the Skadden corporate partner most involved in the transaction was not Mr. Mulaney but was Mr. Duwe?
A. I don't recall that.
Q. Okay. I want to hand up --
THE COURT: I don't think Mr. Duwe does either.
MR. WEINBERGER: Sorry, your Honor?
THE COURT: I don't think Mr. Duwe does either because he didn't recall much of anything. Steadfastly so, I might

add.
MR. WEINBERGER: May I approach, your Honor?
THE COURT: Yes. Thank you.
BY MR. WEINBERGER:
Q. PX52 is an e-mail that you sent -- let me just get my own copy of it -- e-mail that you sent to Mr. Duwe on April 25th, 2006; is that right? It's the middle e-mail.
A. Which one are you reading, sir?
Q. It's the one that is about a quarter of a way down the page, from you to Mr. Duwe dated --
A. Was that "from last Friday"?
Q. Yes, the one that says "congratulations"?
A. Yes, I see that.
Q. This is the -- this is an e-mail that was sent after the closing of the Boston Scientific transaction; is that right?
A. Yes.
Q. And in the middle of this e-mail you say, "Probably the smartest decision I made at Guidant was to hire Chip, and then get him to move out of the way so that you and Alison and, in the early days, Mike DeFrank could do the work;" do you see that?
A. Yes.
MR. WEINBERGER: I have no further questions.
THE COURT: Okay. Mr. Boies?
MR. BOIES: Thank you, your Honor.

REDIRECT EXAMINATION
BY MR. BOIES:
Q. I'm going to hand out a small binder of gathering that together. What was the purpose of you writing that e-mail to Mr. Duwe?
A. It was just a typical post-closing kind of thing that I thought would be appropriate to send to some people who have worked very hard and diligently and well on a transaction in which I was involved.
THE COURT: Did you really have a heart of stone?
THE WITNESS: Well, my wife sometimes thinks so, but my daughter realizes I'm a marshmallow. In fact, she describes me sometimes as a pushover.
THE COURT: Pushover?
THE WITNESS: For her.
THE COURT: We'll see. I haven't asked you any questions yet. Go ahead, Mr. Boies.
MR. BOIES: Thank you, your Honor.
BY MR. BOIES:
Q. In December of 2005, how long had Guidant been a client of Skadden?
A. I don't know for certain, counselor, but several years. I had been, at that point, at Guidant -- your time frame was December 2005?
Q. Yes.

A. I started to work at Guidant in April of 2004. I know Skadden had represented them in some -- on some matters for at least a year or two or three before I got there, but I don't know exactly when.
Q. How long had you been personally working with Chip Mulaney as of December 2005?
A. So about 16 months.
Q. And had you worked extensively with Mr. Mulaney during those 16 months?
A. Yes, very extensively.
Q. What was your view of Mr. Mulaney in December of 2005?
A. I thought he was a wonderful lawyer. I was happy to have him. I felt very comfortable with him. We had worked together for a long time. He always steered me in the right direction, so far as I could tell, and I built up a lot of confidence in him.
Q. By December 2005, had either Skadden or Mr. Mulaney ever given you any reason to doubt their advice?
A. No.
Q. There was a question this morning about whether you had a head of litigation. How large was your law department in December of 2005?
A. It was roughly 25, but the vast majority of them were not at headquarters. I was at headquarters in Indianapolis, and Guidant had a decentralized corporate structure. And most of

the business operations were handled by subsidiaries who were located elsewhere, in particular, in St. Paul and Minneapolis and also out on the West Coast, and most of the lawyers were assigned to those subsidiaries. They reported directly to the CEO of the subsidiary.

Most of them, maybe all of them, only had a dotted-line connection to me. In Indianapolis, I don't remember exactly, there may have been something like four or five lawyers, but even there, they weren't people who were necessarily available to me to do work on things such as this Johnson & Johnson merger. They may have been there because they were lawyers for the HR department or something of that kind.

And by the time of December 5, I don't think there was anybody there that I thought would be of any significant help to me in analyzing and dealing with the issues that were arising.

Q. You were asked a number of times on cross-examination whether you remembered any specific advice, specific conversations with Skadden; do you recall that generally?

A. What was the word after specific, sir? Do I recall or did I get any specific?

Q. You were asked on cross-examination whether you recall, in connection with a number of things like the addendum, the accession agreement --

A. Yes.
Q. -- joint defense agreement, you were asked whether you recalled any specific advice or specific conversations with Skadden. Do you recall that?
A. Yes.
Q. During the period of December 2005 and January 2006, how frequently were you communicating with Skadden and Mr. Mulaney?
A. Well, virtually on a daily basis and sometimes numerous times throughout the day, either by telephone or e-mail.
Q. With respect to the advice that they gave you concerning whether or not you could provide information or whether information could be provided to Abbott, although you don't remember the specific advice or specific conversations, you feel confident you remember the substance of the advice that you received?
A. I do.
Q. And what was the substance of the advice that you received, Mr. Kury?
A. Substance about?
THE COURT: About? About what?
Q. About whether or not the material and information provided to Abbott could or not be provided to Abbott?
THE COURT: You can answer.
A. Oh, what is my basic understanding? My basic understanding was that they had advised me that they viewed Abbott as a

representative of Boston within the meaning of the Johnson & Johnson confidentiality agreement or provisions, non-solicit provisions, et cetera.

Q. With respect to the joint defense agreement and what was referred to as the addendum and the accession agreement and the other documents that you were asked about, who drafted those documents?

A. As between Guidant and Johnson & Johnson or Boston? Or which individuals?

Q. Who was responsible on behalf of Guidant for the drafting of those documents?

A. It would have always have been, so far as I can recall, Skadden.

Q. When Skadden drafted the document and presented it to you to sign, what was your understanding of whether or not Skadden was advising you that this was an appropriate document for you to sign?

A. That was my clear understanding.

Q. I'd like to ask you some questions about some of the documents that counsel for Johnson & Johnson asked you about, and I'd like to begin with John Exhibit 21, which is in the cross book that --

A. Is that going to come up on the screen?

Q. Actually, I think it's also in the little book that I gave you. So it might be easier for you to find it there.

A. Is it coming up on the screen, sir?
Q. I think it is coming up on the screen.
THE COURT: You're very high tech, Mr. Kury. You don't like binders. You like the screen.
THE WITNESS: Well, I'm basically an old fashioned paper guy, but I'm trying to get more into at least the 21st century than I was before.
A. So are we looking at John 21?
Q. John 21.
A. The responsive but yet responsible for the --
Q. Yes. And that's actually the one I want to ask you about. You were asked about your e-mail that's on December 21st at 1:53 p.m. in the middle, where you wrote that you were under tremendous pressure from BSX to accommodate Apple, and you say: So let's do what we can without violating the antitrust constraints reasonably interpreted or otherwise shooting ourselves in the foot; do you see that?
A. I do.
Q. And then Mr. Capek writes back: "We are trying to be responsive yet responsible;" do you see that?
A. I do.
Q. And was that your understanding of what the approach was of Skadden in dealing with these issues, in terms of accommodating Apple that is described here?
A. I'm not sure I fully understand your question, sir. My

understanding was that we -- my attitude and the attitude I tried to convey to the people on the Guidant staff, was that we would do what we could to accommodate Apple and Boston, but we were to be -- at all times to be mindful of our legal obligations to other people.

THE COURT: Well, do you think this e-mail, when you wrote this e-mail or the portions of this e-mail chain that were written by you, you had the Johnson & Johnson merger agreement in mind?

THE WITNESS: This e-mail is addressed, I believe, to -- Can we go back to the prior one? Because I'm seeing the responsive.

THE COURT: This is where paper can help.

THE WITNESS: Okay. Thank you, sir. I think you were talking about the one about, let's do what we can without shooting ourselves in the foot.?

THE COURT: Yes, 1:53, in the middle of the page, time stamped.

THE WITNESS: I see it now. Well, as I see here now, the primary addressees of this were John Lapke and Neal Stoll, particularly Mr. Lapke, his basic role, in fact, about his only role in this transaction was antitrust. He was not a general lawyer. He was an Abbott -- God, I can't speak this morning -- he was a Guidant lawyer out in the West Coast.

But by focusing on antitrust, that's what I was thinking was relevant to them. I was always comfortable that the various parties on the Skadden team, particularly Mr. Mulaney and Mr. Duwe, were very mindful of the Johnson & Johnson agreement, and I wasn't even necessarily expecting someone like Mr. Lapke to be particularly familiar with the Johnson & Johnson agreement.

THE COURT: That's my question. Did this exchange have anything to do with the Johnson & Johnson merger agreement?

THE WITNESS: No, that wasn't my -- I wasn't -- I did not mean to imply that the Johnson & Johnson agreement was irrelevant, but that was the focus of this, was providing information, and there was some -- I guess there was some holdup at some point because of some concern about needing to do some antitrust stuff.

THE COURT: So the admonition, responsive yet responsible, you didn't take that to have anything to do with the J&J merger agreement; this was all about antitrust issues, correct?

THE WITNESS: Yes.

THE COURT: Okay. Next question.

BY MR. BOIES:

Q. Did you have a different approach with respect to the obligations that you had under the Johnson & Johnson merger agreement?

A. No. Are you asking me whether I wanted to be responsible and not shoot ourselves in the foot? Yes, absolutely.
Q. And I'm asking you specifically now, not about antitrust but about your obligations --
A. Yes.
Q. -- under the Johnson & Johnson merger agreement?
A. Yes.
Q. Let me turn to the January 9 call that you've been asked about a number of times. This was a call that you had with Mr. Deyo and Mr. Hilton; do you recall that?
A. I do.
Q. Now, let me begin by asking you to look at Kury 51, which I believe we've included in the small binder that we handed you.
A. I see it.
Q. And this is your response to Mr. Deyo's later January 23 letter, correct?
A. Yes.
Q. But at the very beginning you talk about what you describe as your memory of the January 9 conversation, correct?
A. That is correct, sir.
Q. And you say: My memory of our conversation on January 9, 2006, is it concerns your desire to be assured that Johnson & Johnson was getting all information it supplied to Boston Scientific or Abbott and not previously shared with Johnson & Johnson, and that you asked me to look into the matter and

confirm that this was being done; do you see that?
A. I do.
Q. And was that, in fact, your memory of the conversation?
A. It was.
THE COURT: So you don't recall any discussion, any mention of disclosure of confidential material to Abbott being a breach of the agreement?
THE WITNESS: That is correct, sir.
THE COURT: Okay.
BY MR. BOIES:
Q. Following the January 9 conversation that you had with Mr. Deyo and Mr. Hilton, did you follow up on what you describe here in Kury Exhibit 51 as your understanding of what Mr. Deyo and Mr. Hilton had expressed concerns about?
A. I do recall that, and I think the -- I think it was probably the very same day I sent an e-mail to people at Skadden saying this is what came up on our conversation, and I want to make sure -- Johnson & Johnson wants to make sure that they're getting the information that they're entitled to.
And I said, please confirm that this has been done, and I received responses back, I think still that very day, saying that all the DES information had been sent to them before, and there were one or two additional documents which would be sent out the next day.
Q. Let me try and show you some documents that relate to this

subject. I'd ask you to look first at Defendant's Exhibit 185.

THE COURT: This is in your little binder?

MR. BOIES: It's in the small binder, your Honor.

Q. And in particular, I want to direct your attention to the e-mail from you dated January 9 at 12:24 p.m.?

A. Okay. Let me find it here. Yes.

Q. And this is from you to Mr. Capek and Mr. Lapke and a number of other people at Skadden and elsewhere on the subject of DES due diligence. Do you see that?

A. I do.

Q. And you say: "I'd like to draft an e-mail to Johnson & Johnson telling them that we think they have all the data but we're happy to set up further conversations/access, if that would be helpful. Can you confirm Neal's statement below, re documents that have been shared." Do you see that?

A. I do.

Q. And the statement that you're referring to is the statement from Neal Stoll that is the bottom of the first page of defendant's 185; is that correct?

A. Yes, let me see if I can find -- Can I see the sentence? Yes.

Q. Now, going back to your 12:24 p.m. January 9th e-mail, why did you send that e-mail?

A. I wanted to be responsive to J&J. I wanted to assuage their concern that they may not have gotten everything and if, by some chance, there had been something they hadn't gotten, to please get it over to them because I wanted to be compliant with our obligations to them.

Q. Now, if J&J in this January 9th conversation, had told you that they believed that you had somehow breached any provision of the merger agreement or that they were concerned about possible breach, is that something that you would have informed Skadden about, just as you did in your 12:24 p.m. e-mail about the data issue?

A. Well, of course. At this point, it's only conjecture, but my answer would be absolutely. If they had told me, we think you can't do this, even if I thought they were crazy on that point, I would have immediately called Mr. Mulaney saying, hey, they've raised this, what do we do?

Q. Let me ask you to look next at Defendant's Exhibit 187 and, in particular, there is an e-mail at the bottom of the first page from Alison Rhoten to you, copies to a lot of people, dated January 9th at 6:23 p.m. and the subject of e-mail, "For Juice." And "Juice," of course, is Johnson & Johnson, correct?

A. Yes.

Q. And it says: "Bernie, attached please find a brief e-mail from you to Juice addressing their questions with respect to the DES diligence process. Please let me know if you have any questions or comments in connection with the attached." Do you see that?

A. I do.
Q. And did you understand that this was in response to your earlier request to Skadden, following up with your understanding of what Johnson & Johnson had raised in your January 9th --
A. It is.
Q. -- conversation with him?
A. It is, sir.
Q. Let me ask you to look next at John Exhibit 32.
A. I see it, sir.
Q. And this is dated January 9th, 2006, at 7:44 p.m.; is that correct?
A. Yes.
Q. And this goes from Alison Rhoten at Skadden to, among others, Mr. Townsend and Mr. Hilton and Mr. Deyo, correct?
A. Yes, sir.
Q. With copies to you and Mr. Mulaney and others, correct?
A. Yes.
Q. And it says: "At Bernie Kury's request, please note that all documents included in the data room with respect to Guidant's VI and ES businesses have been burned to a CD and provided to Cliff Birge at Johnson & Johnson, except for DES sensitive documents. DES sensitive documents reviewed by Boston Scientific and Abbott during the diligence process have been provided to Cherylyn Ahrens at Cravath. Copies of

additional documents reviewed by the parties are being sent to Cliff Birge at Johnson & Johnson and to Cherylyn Ahrens at Cravath, as appropriate, tonight via FedEx for delivery tomorrow. The appropriate people at Guidant's VI and ES businesses are available if you have additional questions."

Do you see that?

A. I do.

Q. And what was the purpose, as you understood it, of sending this to Johnson & Johnson the evening of January 9th?

A. To respond to the -- what I understood to be their concern expressed in the earlier phone call on that day.

Q. Now, between January 9th and January 23rd, you met or spoke with Mr. Deyo at least on two occasions; is that correct?

A. I don't recall that, counselor. I'm not saying it's wrong; I just don't recall.

Q. Let me ask you to look at Kury Exhibit 7 in the small binder.

A. Yes, this is the supplement to the proxy statement?

Q. Yes, yes.

A. All right.

THE COURT: Kury 37 you said?

MR. BOIES: Kury Exhibit 37.

BY MR. BOIES:

Q. Now, if you would turn first to the page that bears the Bates number ending 871?

A. I see that, sir.
Q. In the middle of the page there is a paragraph that says: "On the morning of January 11th, 2006, Mr. Weldon and Mr. Deyo met with Mr. Cornelius and Mr. Kury." Do you see that?
A. I do.
Q. Does that refresh your recollection?
A. It does.
Q. And if you go to the next page, the first full paragraph, it says: "On January 13th, 2006, Messrs. Weldon and Deyo again met with Messrs. Cornelius and Kury." Do you see that?
A. I do, sir.
Q. And does that refresh your recollection?
A. Yes.
Q. In either of these meetings or at anytime prior to the January 23rd letter, did Mr. Deyo or Mr. Hilton or Mr. Weldon or anyone representing Johnson & Johnson, suggest to you in any way that there had been any breach of any obligation that Guidant had to Johnson & Johnson?
A. Not that I can recall.
Q. And if they had done that, is that something that you would have acted upon promptly?
A. Absolutely.
Q. Let me ask you to look at Defendant's Exhibit 191. This is an e-mail from you to Mr. Duwe and Mr. Mulaney dated January 6th, 2006, and the time that's shown here is

12:43 p.m.; do you see that?
A. I do.
Q. And you say: "Russ Deyo called this morning. He had two points. One, J&J disagreed with our interpretation of our obligation to furnish info, re our discussions with BSX (i.e. Johnson & Johnson wants us to give them copies of our markups)." Do you see that?
A. I do.
Q. And what was your purpose in writing to Skadden about this?
A. To tell them that a question had been raised by J&J, and I wanted to make sure that we addressed it.
Q. And if J&J had ever raised a question about whether or not there was any possibility that you were breaching any obligation to J&J in terms of providing information to Abbott, is that something that you would have promptly raised with Skadden, just as you did in this example?
A. Yes.
Q. You also note here that Mr. Hilton had indicated that he would be sending you an e-mail on this; do you recall that?
A. Well, I see the words. I do not recall that independently, looking at this document.
Q. Did Mr. Deyo, in fact -- or Mr. Hilton, excuse me. Did Mr. Hilton, in fact, follow up with an e-mail the following day?
A. I don't recall.

Q. Let me ask you to look at Kury Exhibit 83, which was a document that you were shown this morning by counsel for Johnson & Johnson. This is your "this is so lame" e-mail?
A. Yes.
Q. When you wrote that, "this is so lame, not only on the merits but also because J&J will never get the shareholder vote," why was it your view that the January 23 letter that you had just received was so lame on the merits?
A. Well, because it was contrary to the clear understanding that I thought we had on our side that we had the right to do what we were doing, and what he was saying did not dissuade us from that.
THE COURT: So what was your merits-based analysis? I'm not sure I understand.
THE WITNESS: Well, I think my analysis was that we were comfortable that -- very comfortable that Abbott was entitled to due diligence as a representative, and there is this point that we discussed now on a number of occasions. And based on Skadden's interpretation and the confidence that Chip had in that analysis, and my confidence in that as well, that we just didn't think they were telling us anything that we hadn't considered and that we were going to go ahead unless something else happened.
THE COURT: So this was before or after your "but seriously, folks" e-mail?

THE WITNESS: I don't know exactly, sir, because I think I've already mentioned I'm a little clear about -- unclear about exactly when the "but seriously" e-mail went out. I do know it went out -- I'm confident it went out before we sent the response to Mr. Deyo, but I don't know exactly when.

THE COURT: Well, "but seriously, folks" suggests some concern, some doubt as to the merits of your position; is that a fair characterization?

THE WITNESS: No, I don't think it is, sir. I think my view had been all along that Abbott was a representative. I thought that the mention at the end of one of those paragraphs of the possibility of them being another bidder or a joint bidder was not the basis on which I had been relying, and I don't think it was the basis on which Mr. Mulaney and Skadden were relying on making the decision to give the information to Abbott.

THE COURT: So at any point did you ever say to Mr. Deyo that they're a representative? Abbott was a representative of Boston Scientific, we all understood that?

THE WITNESS: I don't recall that that specific word was used, and as I think we discussed yesterday, the response that I sent, prepared by Mr. Mulaney, did not specifically use the word representative.

THE COURT: But that was your understanding all along?

THE WITNESS: That was my understanding.

THE COURT: Representative?

THE WITNESS: Yes, sir.

THE COURT: That was in your mind on January 23rd, that they were a representative?

THE WITNESS: That was my understanding of the position, yes.

THE COURT: You had, in fact, the Johnson & Johnson merger agreement in your mind, that representative was a term used in that agreement?

THE WITNESS: Yes.

THE COURT: That was in your head?

THE WITNESS: I believe so, sir.

THE COURT: All right. Well, let's go. Let's take a minute. Can you pause? Let's go to the merger agreement. If you could, go to 4.02(A). You have representative with a capital R, which is a defined term. Do you agree with that?

THE WITNESS: Yes, sir.

THE COURT: That definition we have to take is in the document, but the defined term also includes the term representative, a model of drafting as we said, but nonetheless, that's what it is. So representative with a small R, can you highlight that?

THE WITNESS: I see it, sir.

THE COURT: And so was representative with a small R a defined term?

THE WITNESS: No, not on the face of it. No.

THE COURT: Well, are you aware of there being any definition section in this agreement that says representative, with small R, means anybody on the same side of the deal as Johnson & Johnson?

THE WITNESS: I don't think there is any such provision, sir.

THE COURT: Okay. So any reason why representative should mean something other than the dictionary definition of the term?

THE WITNESS: My understanding was that based on Skadden's interpretation of the agreement, that the word representative, with the lower case R, was not necessarily hard and fast in its meaning, and it had to be interpreted in the light of --

THE COURT: You had that conversation with someone from Skadden?

THE WITNESS: That was my understanding. My understanding, sir, even at this point --

THE COURT: Based on something that someone at Skadden told you, or that was your understanding based on the cosmos?

THE WITNESS: That was based on my understanding of what I was being told by Skadden.

THE COURT: Who told you this?

THE WITNESS: I believe it was Mr. Mulaney.

THE COURT: Okay. Now, representative in Black's Law Dictionary is defined as one who stands for or acts on behalf of another. So did Abbott stand for or act on behalf of Boston Scientific?

THE WITNESS: I don't -- I did not look up the dictionary --

THE COURT: I'm not asking that. I'm not asking that.

THE WITNESS: Okay. So --

THE COURT: Do you believe now, as you sit here, that Abbott stood for or acted on behalf of Boston Scientific in this deal?

THE WITNESS: I don't think I can say that.

THE COURT: Okay. So how about in January of 2006, do you recall thinking then that Abbott was standing for or acting on behalf of Boston Scientific?

THE WITNESS: At the time, I didn't think that that was the specific test that would be applicable.

THE COURT: Okay. Not my question. Merriam Webster's Dictionary describes representative as serving to represent or standing or acting for another, especially through delegated authority.

Did you think that Boston Scientific had delegated authority to Abbott?

THE WITNESS: No, I did not.

THE COURT: Or that Abbott was standing or acting for

Boston Scientific?

THE WITNESS: In a way, they were. They were acting as part of the Boston team that had been assembled by Boston to help Boston carry out its proposal.

THE COURT: All right. So now you're saying that you do think that they're representative. So you do think they were standing or acting for Boston Scientific?

THE WITNESS: I think what I'm saying, sir, is that in the classic definition of representative, if you think it means someone who's basically in an agency relationship, delegated authority, that kind of thing, they were not. But in a broader sense, they were.

THE COURT: Well, words have to have meaning, right?

THE WITNESS: Yes.

THE COURT: And so you're telling me that you thought representative had a meaning different from the dictionary meaning and that it was so broad as to include anyone that was on the same side of the deal?

THE WITNESS: I don't know that I'd go that far, but first, I was not aware of the dictionary definition. I did not look it up.

THE COURT: But do you need a dictionary to know what representative means?

THE WITNESS: I had Skadden Arps to tell me what it meant in this context.

THE COURT: And without Skadden Arps, you would have been lost? Did you not take the SATs? I have seventh grade twins, and they know what representatives means. I don't know why this is so hard.

You're telling me that, but for Skadden Arps, you would have been lost in determining what representative meant?

THE WITNESS: If I didn't have Skadden Arps, I would have had to do more analysis on my own, but I did have Skadden Arps, and they were supposedly experts in this kind of thing.

THE COURT: And so you recall having a conversation with Chip Mulaney about the meaning of representative?

THE WITNESS: Yes, sir.

THE COURT: But you don't know when that was?

THE WITNESS: No, I don't.

THE COURT: And you don't know where it was?

THE WITNESS: No, I don't.

THE COURT: And it wasn't written down anyplace?

THE WITNESS: That is correct.

THE COURT: And so you just have a vague recollection that you had that conversation?

THE WITNESS: Yes. My clear understanding was Skadden's advice was to the effect that Abbott was a representative.

THE COURT: And yet, when you wrote a letter to Russ Deyo, who is basically accusing you of breaching the agreement, his letter on January 23rd, you don't fall back on the understanding you had of representative?

THE WITNESS: The response was drafted for me by Mr. Mulaney. I looked at it quickly and sent it out. I thought it was sufficient. I don't even know that I focused on the fact that he did not specifically use the word representative, but since it was his -- he was telling me what ought to be said based on his analysis, I sent it out, and I --

THE COURT: So included a discussion or at least a reference to joint bidder that neither you nor he thought was even relevant as a basis for providing these documents, but neither you nor he ever mentioned the term representative as the basis for providing these documents; is that correct?

THE WITNESS: That is correct.

THE COURT: Okay. All right. Go ahead, Mr. Boies.

BY MR. BOIES:

Q. Let me just follow up on one thing. The Court asked you whether you knew when the conversation or conversations that you had with Mr. Mulaney took place. Although you do not recall specifically when, do you recall generally when those conversations took place?

A. Well, they would have been before we provided the due diligence.

THE COURT: Well, do you have a recollection of that, or you're surmising it going back?

THE WITNESS: I wouldn't have authorized a provision --

THE COURT: That's not the question. Do you have a recollection as to when it was?

THE WITNESS: No. I'm surmising at this point.

THE COURT: Okay. Do you have a recollection of a conversation in person with him?

THE WITNESS: No. We rarely met in person except when he came to Indianapolis for a board meeting.

THE COURT: Do you have a recollection of there being other people involved in this conversation?

THE WITNESS: I do not recall, sir.

THE COURT: Okay. Next question.

BY MR. BOIES:

Q. Based on the way you were approaching these issues, would you have provided information to anyone, including Abbott, without getting Skadden's advice?

A. Absolutely not.

Q. As you sit here now, do you have any doubt that you got Skadden's advice as to the propriety of furnishing confidential information to Abbott prior to the time that that information was furnished?

A. I'm absolutely sure that I got it before, based on the way I do things.

Q. Now, let me ask you to turn to the subject of

communications that you had with Johnson & Johnson concerning Boston Scientific and concerning Abbott. In that connection, let me ask you to look at Defendant's Exhibit 173. This is a letter that you sent November 2, 2005, to Mr. Deyo --
A. Yes.
Q. -- is that correct?
A. It is.
Q. And you are notifying Mr. Deyo about the November 1, 2005, unsolicited call that Mr. Cornelius received from Mr. Nicholas, chairman of Boston Scientific; is that correct?
A. It is.
Q. And why did you send this letter?
A. Because on one of the provisions of that 4.02(C), I think we were supposed to tell them of this kind of thing.
Q. Let me ask you to now turn to a series of questions that you were asked on cross-examination about financing commitments and financing conditions. And at one point, you were asked whether the people providing financing to Boston Scientific had any conditions to the financing commitments; do you recall that?
A. Yes. Only vaguely, but yes.
Q. Let me ask you to look first at Kury Exhibit 11, and this is an e-mail to you December 9, 2005, attaching the Bank of America and Merrill Lynch commitment letter for Boston Scientific; is that correct?

A. Yes.
Q. And if you go to the second page, which bears Bates Number ending 3139, you'll see right at the top that Merrill Lynch and Bank of America are defined as the initial lenders to Boston Scientific. Do you see that?
A. I do.
Q. Let me ask you now to turn to the page ending 3142.
A. Yes.
Q. And at the top of the page you'll see subparagraph (e) --
A. Yes.
Q. -- where the Boston Scientific financing firms, Merrill Lynch and Bank of America say, "this is as a condition of their lending," correct?
A. Yes.
Q. It says, "We shall have had the opportunity to conduct, and Guidant shall have cooperated reasonably in the conduct of, a customary legal, regulatory, tax, environmental, accounting and business due diligence investigation of Guidant and its subsidiaries, and we shall be satisfied in our sole judgment with the results thereof." Do you see that?
A. I do.
Q. And is that consistent with your understanding as to the due diligence requirement that Boston Scientific's lenders had?
A. Yes.
Q. Let me ask you next to look at the Strain Exhibit 6. And

this is a cover e-mail from Mr. Duwe to you with copies to Mr. Mulaney and others, dated December 12, 2005; is that correct?
A. Yes.
Q. And I believe this document, or a very similar one, was discussed with you by counsel for Johnson & Johnson on cross-examination. Let me ask you to turn to the last page of this exhibit.
A. Yes.
Q. In paragraph No. 3, at the beginning, it says, "The lenders must be satisfied in their sole judgment with the results of customary legal, regulatory, tax, environmental, accounting and business due diligence of Guidant and its subsidiaries." Do you see that?
A. I do.
Q. And this is Skadden's discussion, analysis, description of Boston Scientific's financing commitment letter, correct?
A. Yes.
Q. And Skadden then goes on to say, "This is a customary condition, given the lenders have not had access to Guidant for any due diligence. We should be clear to Boston Scientific that we expect their lenders' diligence to be completed along with their own prior to signing, and this condition to be eliminated in an amended commitment letter." Do you see that?
A. I do.

Q. And was that consistent with your understanding as to whether or not Boston Scientific lenders would be given due diligence concerning Guidant prior to signing of a definitive agreement?
A. It is.
Q. Now, let me ask you to look at Defendant's Exhibit 219, and this is a cover e-mail dated January 5, 2006, from Skadden to Johnson & Johnson and Cravath, copying you, correct?
A. It is.
Q. And it says, "Attached, at the request of Bernie Kury, please find documents sent to Guidant by Boston Scientific today." And did you, in fact, request that these documents be sent to Johnson & Johnson?
A. I don't recall that I did, but I have no reason to doubt what it says here.
Q. And if you go to the Bates numbered page ending 564.
A. This is the January 9, commitment letter?
Q. Yes.
A. I see it.
Q. And you see that this is being furnished to Johnson & Johnson?
A. What I see in front of me on the first page, addressed to Boston, I don't -- is it down at the bottom with the copy, or is this attachment to the -- something else?
Q. It may be helpful if you actually look at the document in

paper form.
A. Well, I have to get up and pick up the binder that I dropped. I think this is the one that you asked me to get. Excuse me. So this book?
Q. Yes. It was the book I gave you this morning.
A. Okay. What is the document number, sir?
Q. It's Defendant's Exhibit 219.
A. 219. Okay. I'm finally coming to it, sir. Okay. This is at the request of Bernie Kury, I'm sending you something?
Q. Yes. And attached here, do you see that one of the things that is attached, beginning at the Bates numbered page ending 3564, is the Merrill Lynch and Bank of America January 9, 2006, commitment letter?
A. Yes, I see that.
Q. Or, rather, a draft of that commitment letter?
A. Yes, I see that.
Q. And if you turn to the Bates number page 3567, up at the top, do you see the same language that we looked at in another version of this draft, where Boston Scientific's lenders write, "We shall have the opportunity to conduct, and Guidant shall have cooperated reasonably in the conduct of, a customary legal, regulatory, tax, environmental, accounting and business due diligence investigation of Guidant and its subsidiaries, and we shall be satisfied in our sole judgment with the results thereof"?

A. I see that.
Q. And at any time after this was furnished to Johnson & Johnson, did Johnson & Johnson ever complain that it was, in any way, inappropriate to furnish Guidant confidential information to Bank of America or Merrill Lynch?
A. I do not recall that they ever did.
Q. On cross-examination, you told counsel for Johnson & Johnson that you did not view Mr. Deyo's letter on January 23rd as a classic demand breach letter, saying you are in breach; do you recall that?
A. I do.
(Continued on next page)

BY MR. BOIES:
Q. Let me ask you to look at Deyo Exhibit 9.
A. Yes.
Q. The second page of this is November 3, 2005 to Mr. Deyo?
A. I see that.
Q. Is this the kind of letter that you would have in mind when you talk about a classic demand or breach letter saying you are in breach?
A. Yes, it is.
Q. Is this the kind of letter that you would expect to get from Johnson & Johnson if they believed that you were in breach?
A. If they were serious about it, yes.
Q. Now, we've talked a lot about breaches. As a lawyer, you make a distinction between a breach and a material breach, correct?
A. It's sometimes made, yes, sir.
Q. At any time ever in January of 2005 or December of 2005, or February 2005 -- or 2006; that is, any time from December January February during this time period, 2005 to 2006, did Johnson & Johnson ever suggest that there had been a material breach of the merger agreement or any obligation that Guidant had to Johnson & Johnson?
A. Not that I recall.
MR. BOIES: I pass the witness, your Honor.

THE COURT: OK. Mr. Weinberger, any questions?

MR. WEINBERGER: Yes.

RECROSS EXAMINATION

BY MR. WEINBERGER:

Q. Just put back the letter that -- what was the letter you just showed him, David?

MR. BOIES: Deyo 9.

THE COURT: Which letter? The last one?

MR. WEINBERGER: Yes.

THE COURT: It's a fax.

MR. BOIES: DX-173.

Q. Basically, the letter you wrote to Russ Deyo, you didn't use the word material breach in there, did you?

A. I haven't seen it. Hold on.

THE COURT: What exhibit are you talking about?

MR. BOIES: I think he's referring to Deyo 9.

THE COURT: A November 3, 2005 email, are you talking about that, Mr. Weinberger?

MR. WEINBERGER: No.

Q. Actually, the letter that you wrote to Mr. Deyo advising him you believed Johnson & Johnson had an obligation to close the agreement; that Mr. Boies just showed you, you did not use the word material breach in there, did you?

A. I still don't have it in front of me, but I don't recall that I did.

THE COURT: Pull it up. I'm not sure.

MR. BOIES: It was the second page Deyo Exhibit 9.

THE COURT: November 3, 2005 letter?

MR. BOIES: Yes, your Honor.

THE COURT: OK.

A. No, the word is not in there, sir.

Q. You testified that the substance of the advice that was given to you by Skadden was that Abbott was a representative. Is that right?

A. Yes.

Q. The fact is you do not even recall reaching the conclusion that Abbott was a representative before Guidant began furnishing information to Abbott. Isn't that right?

A. I think the question -- what I said was I don't have a specific recollection of the time and place, but I am confident that I would not have authorized such a thing if I had not received Skadden's blessing on it.

Q. That is not what I'm asking you?

A. What are you asking me, sir?

Q. I'm asking you whether it's correct that you did not reach the conclusion prior to furnishing information about Guidant to Abbott in December 2005 that Abbott was a representative of Boston Scientific?

A. My understanding has always been that that was the basis on which we started to provide information to Abbott.

Q. Do you remember testifying in response to the Judge's questions yesterday on this issue?
A. Well, I hope so, but please refresh me, sir.
THE COURT: I'm not sure I do. So please refresh us all.
Q. Do you remember that you said you didn't remember, first of all, whether Mr. Mulaney actually even said they were a representative?
A. That is correct.
Q. I am going to ask you to look at your deposition at page 291 beginning at line 6.
Did I ask you the following question and you gave me the following answer:
"Q. Did you reach the conclusion prior to furnishing information about Guidant to Abbott in December of 2005 that Abbott was a representative of Boston Scientific?
"A. I've answered that I think several times. I don't recall the technical analysis. I recall feeling comfortable with the situation we were in and the procedures we were following."
Q. Did you give that testimony?
A. That's what I said.
Q. Could you look at Defendant's Exhibit 101 that Mr. Boies showed you?
A. 101?
Q. 101.

THE COURT: Defendant's 101?

MR. WEINBERGER: I think I have the wrong Exhibit.

THE COURT: 191, maybe?

MR. WEINBERGER: It's January 6.

THE COURT: 191.

MR. WEINBERGER: Yes, 191.

Q. Mr. Kury, this is dated January 6, 2006. Is that right?

A. Yes.

Q. And the subject matter of this call was a discussion about what Guidant was obligated to provide to Johnson & Johnson. Is that right?

A. Yes.

Q. You had no reason to believe that as of January 6, 2006 Mr. Deyo knew that Guidant had provided information to Abbott, did you?

A. No, I don't think I did.

Q. In fact, as we saw yesterday, they had been sent letters providing them with the information that had been provided to Abbott that said that the information had been provided to Boston Scientific and its advisors?

A. I remember that, sir.

Q. But you knew that on January 6, didn't you? You knew that information had been provided to Abbott?

A. I knew that sir, yes.

Q. And you didn't tell them that on this call, did you?

A. That is correct.
Q. Could you turn to Kury Exhibit 83. This is the email where you said the position was lame. Do you see that?
A. Yes, I see that.
Q. And you still believe that today, don't you?
A. Yes, I do.
Q. Are you aware that at least one federal judge has found that an interpretation of Abbott as a representative of Guidant was not a reasonable interpretation?
A. I have heard that.
Q. And you believe that was improvident, don't you?
A. I do.
THE COURT: You think it was lame?
THE WITNESS: I wouldn't say that about any judicial ruling.
THE COURT: He's on the circuit now, so you probably could get away with it.
BY MR. WEINBERGER:
Q. I'd like to ask you about the financing issues that were raised by Mr. Boies. Were you aware that Bank of America Securities was hired as a financial advisor to Boston Scientific?
A. I don't recall, sir.
MR. WEINBERGER: I am going to have to mark a few documents here, your Honor.

Q. First I am going to hand up PX-38?

THE COURT: What are we calling this, Plaintiff's 38?

MR. WEINBERGER: Yes.

Q. Have you seen this before?

A. Not that I recall. I may have. I don't recall.

Q. This is a letter pursuant to which Bank of America Securities was retained by Boston Scientific to act as a financial advisor?

THE COURT: Are you testifying to that fact or is it being stipulated?

MR. WEINBERGER: No, I'm just asking him if he is aware of that.

THE COURT: The question was: "This is a letter pursuant to which"-- so. Do you recognize this?

THE WITNESS: I don't recognize -- I may have seen the letter. I don't recall having looked at it, if ever, until it was put in front of me. Maybe I did. I see the first paragraph, and I see it refers to "will act as financial advisor."

Q. Let me ask you this: Does it refresh your recollection as to whether or not Bank of America Securities was retained as a financial advisor to Boston Scientific?

A. No, it does not.

Q. Do you know if Bank of America Securities was part of the lending group?

A. I believe that's correct, yes.
Q. One more document. This will be PX-39. Actually, this is already marked as Hartman Exhibit 2, so I don't think we have to mark it?
THE COURT: What is it? Hartman Exhibit 2? I don't have a copy handy, so you are going to hand up copies?
MR. WEINBERGER: Yes.
Q. Have you seen this before?
A. I'm not certain at this point. I can't say one way or the other.
Q. You see this is a letter addressed to Merrill, Lynch, Pierce, Fenner & Smith by Bank of America Securities -- sorry -- a letter addressed to Boston Scientific by Merrill Lynch and Bank of America Securities?
A. Yes.
Q. Do you see where it says "retention" on the bottom of the first page?
A. I do.
Q. "Subject to the provisions set forth in this letter agreement, you hereby retain each of us." I'll stop reading. Do you see that?
A. Yes.
THE COURT: You don't think that Abbott was retained by Boston Scientific, do you? As you understand that term.
THE WITNESS: You're not referring to this document?

THE COURT: No. I'm referring to a verb that's in this document, but do you think Abbott was retained by Boston Scientific in connection with its takeover proposal?

THE WITNESS: No.

THE COURT: OK.

BY MR. WEINBERGER:

Q. You testified in response to Mr. Boies' questions that if J&J had raised an issue about providing diligence to Abbott, you would have promptly brought it to Skadden's attention like you did when Mr. Deyo called you regarding a copy of Guidant's markup of Boston Scientific's draft merger agreement. Do you recall giving that testimony?

A. What was the last part of your question? But I did not --

Q. You testified in response to Mr. Boies' question that if J&J had raised an issue about providing diligence to Abbott, you would have promptly brought it to Skadden's attention like you did when Mr. Deyo called requesting a copy of Guidant's markup of Boston Scientific's draft merger agreement. Do you recall that?

A. Yes.

Q. Do you recall that Mr. Deyo called you on December 31 -- and I think we went over this in your cross-examination -- requesting information about the contemplated license back of the DES technology?

A. I don't recall it, no.

Q. Do you remember you bringing that to Skadden -- you can actually look at Stoll Exhibit 19 in the books that I gave you on cross.
A. I see the document. What is it you're asking me, sir?
Q. You remember you promptly brought that request to Skadden's attention?
A. What is the "this" that we're referring to? What would I have brought to their attention?
Q. This was information about what Boston Scientific was contemplating in the way of a license back from Abbott when it divested the VI and ES?
A. I'm getting lost in the details here, but if they told me they wanted something or thought we were in default, I presume --
Q. Do you remember Skadden informed you that if contacted by J&J, they would tell J&J that they knew nothing more than what was publicly disclosed? Do you remember that?
A. Well, I'm reading it. I'm reading it now, yes.
Q. And do you recall that when J&J did call Skadden, that's exactly what they were told. Isn't that right?
A. So far as I know, yes.
Q. Do you remember also that during that call Skadden also told J&J that there had been no discussions about divesting the co-promotion agreement? Do you remember that?
A. I lost the last sentence.

Q. There had been no discussions about divesting the co-promotion agreement?
A. That's what I remember. Is that what I said before or are you asking whether I remember now?
Q. OK. Do you remember now?
A. No, I don't think so.
Q. Do you remember that Russ Deyo called you on December 20 to remind you of Guidant's obligation to provide J&J with any information related to Guidant's DES assets that Guidant provided to Boston Scientific. Do you remember that? We talked about that yesterday too?
A. Yes, I think so.
Q. And you probably raised that issue with Skadden, didn't you?
A. Yes, I did.
Q. And subsequently you did send J&J the materials under cover letter that said they had been provided to Boston Scientific and its advisors. Do you remember that?
A. I do.
Q. And Skadden sent that letter after you signed an accession agreement which represented that Abbott had been retained to advise Boston Scientific. Do you remember that?
A. It followed in -- it was after that other agreement had been signed, yes.
Q. Now, you testified that you never had any reason to doubt

Skadden's advice in response to Mr. Boies' questions. Do you recall that?
A. Yes, I do.
Q. Yesterday you testified that you saw the language in the accession agreement, and you spoke to someone at Skadden about that, right?
A. I did.
Q. And Skadden told you it was OK to sign that agreement, right?
A. Yes.
Q. Even though it falsely represented that Abbott had been retained by Boston Scientific. Is that right?
A. I don't accept that characterization, but I did say that I was told by Skadden --
THE COURT: You don't accept what characterization?
THE WITNESS: Well, that it's falsely. I think it -- that's another question that we debated, I guess, but I didn't think of it as anything in the way of a false representation to anyone. It was something that happened; it came up in the drafting; and I was told it wasn't significant; and I didn't focus on it and think, "Oh, my God" --
THE COURT: Wait a minute. I just asked you a moment ago did you understand that Abbott was retained by Boston Scientific. I said, "You don't think that Abbott was retained by Boston Scientific, do you?"

And you said, "You're not referring to this document?" We were talking about this document.

THE WITNESS: Yes, your Honor.

THE COURT: You can have that if you want.

And then I said, "No, I'm referring to a verb that's in this document, but do you think Abbott was retained by Boston Scientific in connection with its takeover proposal?"

Your answer was, "No."

THE WITNESS: That's still my answer.

THE COURT: Right. So I'm trying to figure out why would you sign a document -- this is Kury 22. Look at the highlighted portion.

THE WITNESS: Right.

THE COURT: Look at the back page, the very last page all the way in the back. It's two-sided. That's your signature, right?

THE WITNESS: Absolutely.

THE COURT: Why would you sign a document that says something that you just told me was not true?

THE WITNESS: Because I consulted Skadden, and they told me it was not a significant matter; it was not a problem; it was all right for me to sign.

THE COURT: I guess that's my question then. So if Skadden told you day was night, you would sign it if they said it was OK and didn't matter?

THE WITNESS: Presumably not, sir.

THE COURT: Well, but this, I would think, is pretty significant. It's the first line of the second paragraph of a document that is part of an important takeover proposal, right? I mean, this is a takeover deal that is going to be worth billions of dollars, but you signed a document that you understood to be false? Or did you not even think about it?

THE WITNESS: I did -- I have testified, and I put in my trial affidavit, that I remember raising the question in some fashion that the word -- and mentioned on the idea that the word advisor stood out to me, and I recall that I consulted someone at Skadden on it. I don't remember who at this point or how extensive the conversation was. But the bottom line takeaway was it was all right for me to sign that. Now, I don't know exactly what their rationale was --

THE COURT: What is your rationale? I'm less concerned about their rationale. I want to know your rationale. What is your rationale for signing a document that is false? You're a lawyer. You took an oath when you joined the bar. You went to law school. I mean, when you're practicing, you have to take CLE's that get you ethics credits that show you're on top of what is required in the profession.

So what is it that prompted you? What was your rationale for signing a document that you thought was not accurate, was false?

THE WITNESS: My rationale, sir, is that I consulted Skadden. They told me it was all right for signature. I didn't dwell on it and relied on their advice.

THE COURT: OK.

BY MR. WEINBERGER:

Q. So that advice didn't cause you to doubt what they were telling you, did it?

A. No.

Q. Skadden also advised you to sign an agreement obligating Guidant not to disclose the identity of potential purchasers of the assets to be divested even if it was required to do so under the merger agreement, didn't they?

A. It didn't say that. It said we would not disclose their identity without consent.

Q. Right, but, in effect, that meant you obligated yourself not to disclose the identity even if it had been concluded that it was required under the merger agreement, right?

A. That could have been the case if it had been required, but so far as I know, Skadden never thought it was required prior to the time that we actually did disclose it.

Q. So that didn't cause you to doubt Skadden's advice, did it?

A. No.

Q. And Skadden advised you to send a response to Mr. Deyo's January 23 letter that didn't include any reference to the rationale you tell us they provided you for giving due

diligence to Abbott; that is, that Abbott was Boston's representative. Is that right?
A. Yes.
Q. And that didn't cause you to doubt Skadden's advice, did it?
A. No.
Q. Now, could you turn to Defendant's Exhibit 173. This is the November 1 letter. You were asked about this letter that you sent to Mr. Deyo on November 2, 2005.
A. I see it, sir.
Q. And you said you did this in order to comply with Section 4.02. Is that right?
A. Yes.
Q. There were other reasons, however, that this letter was sent to J&J on November 2, weren't there?
A. Is there a question there, sir?
Q. Were there other reasons that this letter was sent to J&J on November 2?
A. I don't recall.
Q. Well, you do recall that by late October J&J had informed Guidant that it was having second thoughts about following through with the deal. Is that right?
A. Yes.
Q. And there was a possibility that J&J would declare a material adverse change and terminate the agreement?

A. Yes.
Q. There was concern at Guidant and Skadden that J&J would do so, wasn't there?
A. Yes.
Q. Didn't Skadden suggest that you send this letter because it would underscore that Guidant believed the merger agreement remained in effect. Is that right?
A. I don't know what you're -- where you got the last part. That may be right. I don't remember them saying that.
Q. Is one of the reasons this letter was sent, did Skadden tell you that one of the reasons this letter was sent was that it would be a low-key way to communicate that there could be competition?
A. We were obviously reading from something, sir, but I don't remember that, but I'm not saying that couldn't have happened.
Q. Let me hand up and show you -- before I hand it up to you, was another reason that it could provide an opportunity to learn more about J&J's position?
A. It could well have been, yes. I'm speculating at this point, and I'm not remembering the document you are about to hand me.
Q. Mulaney Exhibit 11. Is this an email that you got from Mr. Duwe?
A. It appears to be so.
Q. Mr. Duwe says, "Chip and I still thinks it makes sense to

send a letter to Juice today under Section 4.02 of the merger agreement regarding the call from BSX's chairman."

Do you see that?

A. Yes.

Q. "It both underscores that we still believe the agreement is in effect, and in a low-key way it communicates that there could be competition." Do you see that?

A. I do.

Q. And he also says, "This might also provide an opportunity to learn more about their position." Is that right?

A. It does.

Q. Those accurately state the reasons why you were advised by Skadden to send that letter on November 2. Isn't that right?

A. Seems to be that, sir.

MR. WEINBERGER: I have no further questions.

THE COURT: OK. Anything?

MR. BOIES: Just briefly, your Honor.

REDIRECT EXAMINATION

BY MR. BOIES:

Q. Mr. Kury, counsel asked you about whether or not you had cause to doubt Skadden's advice with respect to a number of the issues. I want to go through a couple of them.

He asked you whether the fact that the term representative was not in what they had drafted for you to send in response to Mr. Deyo's January 23 letter prompted you to

doubt Skadden. You said it did not. Why not?
A. Is that your -- is that a question, sir?
Q. It is. In other words, why --
THE COURT: What is the reason for your absence of doubt?
MR. BOIES: Exactly.
THE WITNESS: Well, my understanding had been all along that Skadden was absolutely steadfast in its view that this -- that Abbott was a representative, and that had been my understanding, and when I read this, I'm not even sure I focused on the fact that they didn't use the word representative. It was not a formal opinion. It wasn't a paragraph-by-paragraph analysis. Presumably we could have done one if we wanted to, but I felt comfortable with their advice, and the fact that he doesn't use the word representative did not change in my mind any advice he'd given me.
THE COURT: When you say "Skadden was absolutely steadfast in its view that Abbott was a representative," who besides Mr. Mulaney said that to you?
THE WITNESS: I think it was almost -- my conversations on this subject I think were almost exclusively with Mr. Mulaney.
THE COURT: Do you think Mr. Duwe said something like that?
THE WITNESS: I don't recall, sir.

THE COURT: All right. And we have gone over this a couple of times, but you don't have any specific recollection of a time, place or manner in which Mr. Mulaney conveyed this view about Abbott being a representative?

THE WITNESS: Well, the manner would have been a telephone call.

THE COURT: Telephone call, that's true; you did say that.

THE WITNESS: But other than that, you're correct, sir.

THE COURT: Go ahead. Sorry to interrupt.

BY MR. BOIES:

Q. Counsel also asked you whether you had agreed not to reveal the names of potential purchasers. Do you recall that?

A. In the context of the confidentiality amendment? Are you talking about that, the agreement?

Q. Yes.

A. Yes, I do recall that.

Q. Did you receive advice from Skadden that it was not necessary under the merger agreement to identify potential purchasers but only people who had actually signed an agreement?

A. In effect, I got that advice, yes.

MR. BOIES: I have no more questions, your Honor.

THE COURT: Anything?

MR. WEINBERGER: No, your Honor.
THE COURT: OK, Mr. Kury. It's been a marathon. Appreciate it.
(Witness excused)
THE COURT: Our next witness is Mr. John. Is that right?
MR. DUMAIN: Mr. John.
THE COURT: It's 11:00. Do you want to take a break now?
MR. WEINBERGER: Just to set up.
THE COURT: We will do that, and then we will begin with Mr. John. Thanks.
(Recess)
IAN JOHN,
called as a witness by the Defendant,
having been duly sworn, testified as follows:
DIRECT EXAMINATION
BY MR. WILSON:
Q. Good morning, Mr. John.
A. Good morning.
Q. I've handed you a copy of what's been marked as Defendant's Exhibit 165. If you would take a moment to review that, please.
A. OK. I've reviewed it.
Q. Do you recognize this document?

A. I do.
Q. What is it?
A. It's the declaration that I provided as direct testimony.
Q. Is there anything in that direct testimony affidavit that you would like to change or is it still your testimony today?
A. It's still my testimony today.
MR. WILSON: I would like to move to admit Defendant's Exhibit 165 and pass the witness.
THE COURT: 165 is received.
(Plaintiff's Exhibit 165 received in evidence)
THE COURT: Who is doing the cross? Mr. Weinberger?
MR. WEINBERGER: Yes.
CROSS-EXAMINATION
BY MR. WEINBERGER:
Q. Just as a preliminary matter, Mr. John, you said you didn't want to change anything in your affidavit?
A. That's correct.
Q. But you are not a partner at Skadden, Arps any more, are you?
A. That's correct.
Q. You're at a different firm?
A. That's correct.
Q. What firm is that?
A. Kirkland & Ellis.
Q. So you do need to make that change, right?

A. Yes, I do. Thank you for that.
Q. Mr. John, you have a binder there with exhibits that I am going to be referring to from time to time. They will also be on the screen for you if it's easier.
First of all, would you turn to Stoll Exhibit 1. They are in alphabetical order, as I'm sure you know.
THE COURT: Stoll Exhibit 1?
MR. WEINBERGER: Yes.
Q. Do you recognize that as the Boston Scientific/Guidant confidentiality agreement?
A. Yes.
Q. Did you provide feedback on this agreement to the extent -- withdrawn. Did you provide feedback on the proposed addition of third party divestiture candidate to the definition of representatives?
A. I believe so.
Q. Is it correct that you agree that providing due diligence to potential purchasers of Guidant's assets to be divested would be acceptable from an antitrust perspective if confidentiality limitations were implemented to ensure that Guidant's competitively sensitive information was not improperly shared with a competitor or a potential competitor?
A. Yes.
Q. It is also correct, is it not, that you never gave any advice to Mr. Kury or anyone else at Guidant that this change

was consistent with the J&J merger agreement?
A. I don't believe I did, no.
Q. Turn to the addendum. You're familiar with the addendum to the confidentiality agreement that was ultimately negotiated? I am not directing you to the document yet.
A. Oh. Sorry about that. Yes, I am familiar with it.
Q. And you were involved in drafting that document, were you not?
A. I was.
Q. That is a document that deals with the issue of competitively sensitive information, doesn't it?
A. Yes, I think it does.
Q. Now, if you turn to Stoll Exhibit 9. If you would look at this draft, this was a draft that was sent by Skadden to Shearman, was it not? On December 12, you said, "I attach a draft addendum to the confidentiality agreement."
Do you see that?
A. I'm sorry, I'm just trying to read the email and the attachment.
Q. Actually, this is an internal email, isn't it? Who is Melissa Brasswell? Let's start there.
A. I'm sorry, counsel, I am still trying to read the document.
THE COURT: Just answer the question, who Melissa Brasswell is.
THE WITNESS: OK. At the time I believe she was a

corporate associate at Skadden, but I don't remember specifically.
Q. So, go ahead and read the document and tell me when you're done with it.
A. OK.
Q. I'm going to focus you on something specific, so maybe it would be a little quicker if I told you what I was interested in and then if you needed to read, is that OK?
A. Sure.
Q. So I'm going to ask you about the language that appears at the page that's Bates numbered at the bottom SA 00177162.
A. OK.
Q. It's in paragraph three, and it says, "In no event shall any highly confidential material be provided or disclosed to third parties who are potential purchasers of assets of the company to be divested or any of such parties' representatives without the prior express written consent of the company."
Do you see that?
A. I do.
Q. That was language that one of your corporate associates added to your draft to address this issue. Is that right?
A. I don't remember at the time, but that's what it looks like from the email chain, yes.
Q. Well, that's what you said in your affidavit at paragraph 11, isn't it? "Melissa Brasswell, one of the Skadden corporate

associates advising Guidant, proposed additions to my draft to prohibit the sharing of Guidant's highly confidential information as defined in the addendum with potential divesture purchasers or their representatives without Guidant's prior written consent." Do you see that?
A. I'm sorry, can you just remind me which paragraph?
Q. 11.
A. Thank you. Yes, I see that.
Q. Would you turn to Kury Exhibit 13. I'm sorry Exhibit 18. My apologies.
THE COURT: Plaintiff's? Defendant's?
MR. WEINBERGER: Kury Exhibit 18.
Q. Is Kury Exhibit 18 an email that was sent back to Skadden from Shearman with Shearman's comments to the proposed addendum?
A. OK.
Q. Is that right?
A. I'm sorry, I didn't understand the question. Can you ask it again?
Q. Is this an email that was sent to you attaching Shearman & Sterling's comments to the proposed addendum that you had sent them?
A. That's what it appears to be, yes.
Q. That's what you said in your affidavit at paragraph 13, isn't it? "In response to Skadden's draft addendum, Boston

Scientific's counsel at Shearman & Sterling proposed, among other things, adding language that would have prohibited Guidant from disclosing the existence or name of any potential divesture purchaser 'to any person' without the consent of Boston Scientific and such divestiture purchaser. See Kury Exhibit 18." Is that correct?
A. Correct.
Q. So it's correct within this draft that they sent back and the page Bates numbered 133889, Shearman proposed the following language: "Additionally, in no event shall the existence or name of any third party who is a potential purchaser of the company's assets to be divested be disclosed by the company to any person without the prior express written consent of Boston Scientific and such third party." Is that right?
A. Correct.
Q. After you reviewed this, you believed that you needed some freedom to disclose the names of potential buyers of VI and ES assets, didn't you?
A. Yes.
Q. So you sent back a revision that would have permitted such disclosure if required by law for preexisting agreements. Is that right?
A. Yes.
Q. We can look at that Stoll Exhibit 16 and see if you can identify that as the revision that you sent back. In

particular, the page Bates number SA 00103746?
A. Yes.
Q. I want to focus on the language that you proposed adding "Except as required by law or preexisting agreements." Do you see that?
A. Yes, I do.
Q. In your affidavit, you say that this was not motivated by the merger agreement but rather by the need to disclose information to the FTC and to Guidant's advisors. Is that correct?
A. Yes.
Q. But Guidant didn't have any agreements with the FTC, did it?
A. No.
Q. So that's not why that provision was added, was it?
A. I think the "as required by law" is why that was added.
Q. So the provision about preexisting agreements had nothing to do with the FTC, does it?
A. I don't believe so, no.
Q. You didn't have any agreement with Guidant's advisors requiring disclosure of the identities of third-party divestiture candidates either, did you?
A. I don't know that we -- I'm not sure that's accurate.
Q. You think you had agreements that required Guidant to disclose to its advisors the name of potential purchasers of VI

and ES assets?
A. I believe that Guidant may have had agreements with its advisors that required Guidant to provide certain information to those advisors in order for those advisors to provide whatever advice they were going to be providing and that that information may well have included the identity of the divestiture purchaser.
Q. So you took care of that somewhere else, didn't you? You added that "the company may disclose such information to its representatives," didn't you?
A. I see that we add that language, yes.
Q. And that takes care of that problem, doesn't it?
A. I think ultimately we changed it to be capitalized Representatives to make sure that we captured all of those potential advisors.
Q. And that took care of that problem, didn't it?
A. At the end of the draft I remember actually being finalized, it just had that language because we realized that's all that was necessary.
Q. So that's not why the language about preexisting agreements was put in there, was it?
A. That's why I remember putting it in there. Or I remember it being put in there, excuse me.
Q. But you didn't need it because it already said "may disclose such information to its representatives," and that was

language that you proposed, wasn't it?
A. Both sets of language were in the draft that we sent back, yeah.
Q. And it is correct, is it not, that Shearman then proposed striking the language about preexisting agreements, didn't it?
A. That's my recollection.
Q. Just to confirm, look at Stoll Exhibit 17. Just confirm that that is Shearman & Sterling's draft back to you, crossing out the word "preexisting agreements" on page SA 00158260 right?
THE COURT: 260?
MR. WEINBERGER: Yes, it's 58260, paragraph 6.
Q. You will see that the words "preexisting agreements" is stricken.
A. Yes, I see that.
Q. If you look at Kury Exhibit 21, can you confirm to me that that is the final signed addendum and that language is not in there?
A. Yes, that appears to be the final signed addendum.
Q. The addendum that you drafted and that ultimately became a final agreement, and you could stay on Kury 21 now, included something called a short form accession agreement, didn't it?
A. Yeah, it includes an accession agreement, yes.
(Continued on next page)

Q. And we can see that form that was attached to the final, in the last page of Kury Exhibit 21, Bates numbered 133826; is that right?
A. That's correct.
Q. And you testified in your affidavit that this was a form that had been used by Mr. Stoll and you in the past because it provides a quick, straightforward and effective way for merger parties who want third parties to become involved in due diligence to become bound by the same higher level of confidentiality protection outlined in the addendum; is that right?
A. Correct.
Q. And the form accession agreement recited that the person signing had been -- had been retained by Boston Scientific or Guidant, as the case may be, to advise it in connection with the potential transaction; is that right?
A. Yes.
Q. And this language does provide a business justification for sharing the information from an antitrust perspective; isn't that right?
A. The language reflects the relationship, which provides the business justification.
Q. Right. But being retained to advise the acquiring company is not the only business justification that would suffice under the antitrust laws, would it?

A. That's correct.
Q. If someone was looking to purchase assets, that would be a legitimate business justification, wouldn't it?
A. Yes.
Q. And, in fact, where it was appropriate, you didn't use this form of accession agreement, did you?
A. I'm not sure I understand your question.
Q. Well, for example, when there were employees of Boston Scientific or Guidant who got access to confidential information, you didn't have them sign an accession agreement that said that they had been retained by Boston Scientific or Guidant, did you?
A. I don't recall.
Q. Well, take a look at John Exhibit 17. Do you see on the bottom there's an e-mail from you -- I'm sorry, from Nathan Sawyer of Shearman to you?
A. Yes.
Q. And he's attaching a form of accession agreement to be signed by five different employees of Boston Scientific, right?
A. The only reason I hesitate is I'm not sure if the attachment is what Nathan originally sent or something that was sent later in the chain. But, yeah, there are five Boston Scientific employees listed there.
Q. And this form of accession agreement doesn't say that the employees were retained by Boston Scientific in connection with

the proposed transaction, to advise it in connection with the proposed transaction, does it?
A. No, it does not.
Q. Now, is it correct that on December 20th, you learned that Boston has selected Abbott as the potential divestiture buyer?
A. The timing sounds right, of Boston letting us know that Abbott was a potential divestiture buyer.
Q. The date is of some significance. So if you would look in your affidavit, at paragraph 16, you stated: On or about December 20th, I learned that Boston Scientific had selected Abbott as a divestiture buyer. If you could just confirm to me that that's what you said there?
A. Yes.
Q. And on that same day, you prepared a set of proposed due diligence ground rules for third-party divestiture buyers; did you not?
A. I can't remember if we prepared them that day, but I remember there being a proposed set of grounds rules that were -- that we sent, whether it was internally or externally, I can't remember, about that time.
Q. Okay. If you turn to Kury Exhibit 71 in your book, there's a series of e-mails on the front page, which you are copied on, and then attached to it is a document that says: The following are proposed ground rules for current Bean and third-party due diligence regarding Grape's VI, ES business; do you see that?

A. Yes, I see that.
Q. Okay. And in the cover transmittal, transmitting those ground rules to Mr. Mulaney, Mr. Duwe and Mr. Kury, copying you, wasn't Mr. Stoll expressing the view that Boston might be trying to circumvent Johnson & Johnson's rights under the merger agreement?
A. I'm not sure I follow.
Q. All right. Well, you see the middle e-mail from Mr. Stoll?
A. Yes.
Q. You see he says: Bean is using as leverage our strategy to maximize our position relative to J&J's rights under the merger agreement and not breach any negative or other covenants by taking control of and excluding Skadden from the due diligence process; do you see that?
A. I see that language, yes.
Q. Were you also aware of Mr. Stoll's views expressed in the last portion of the e-mail, this is -- "this is going too fast and is unnecessary. Please consider my comment regarding the importance of having a deal with Bean prior to allowing in-depth third party due diligence"? Do you see that?
A. I do.
Q. Now, going back to the attached ground rules, the ground rules recite -- these are ground rules that you drafted; is that right?
A. I don't remember if I drafted them. I certainly would have

had a hand in drafting them, along with --

THE COURT: Can we just go back to that e-mail? It says reference in here to J&J's rights under the merger agreement. So you were aware of the merger agreement, right?

THE WITNESS: Yes.

THE COURT: Had you read it?

THE WITNESS: Yes.

THE COURT: You'd read section 4.02?

THE WITNESS: I'm sure, at some point, I did, yes.

THE COURT: So you were mindful of that, as you were negotiating the terms of the various agreements you were working on?

THE WITNESS: I remember discussing the provision with Brian Duwe relatively soon after Boston Scientific made its offer and Brian making clear that we needed to coordinate before we exchanged information with Boston Scientific because of the obligations in the non-solicitation provision, which I think is 4.02.

THE COURT: Okay. Go ahead.

BY MR. WEINBERGER:

Q. Now, the document -- going to the ground rules. The document recites -- Let me just find that. The page is Bates No. 345419. Paragraph No. 2 says: All third-party buyers and their advisers -- I'm sorry. All third-party buyers seeking to conduct due diligence regarding Grape's VI, ES business are

representatives of Bean, and as such, must sign the accession agreement. Do you see that?
A. I do.
Q. And the access agreement says that those people have been retained to advise Boston Scientific in connection with the proposed transaction; is that correct?
A. It does.
Q. And you would agree that someone who's been retained to advise Boston Scientific would clearly be a representative of Boston Scientific, wouldn't they?
A. Usually I would think that, yes.
Q. Now, would you agree also that from an antitrust perspective, a person did not have to be a representative to get due diligence in these circumstances, where there's a company that's interested in purchasing assets; isn't that right?
A. I think what you're asking is if -- I think the answer is yes, yes. If you were a party seeking to acquire assets, that would provide an antitrust -- the business justification for providing due diligence, from an antitrust perspective.
Q. If they had signed an accession agreement that said that, that would have given you sufficient comfort from an antitrust perspective; isn't that right?
A. I'm not sure what that means.
Q. That restated the fact that the person that was going to

get the diligence was interested in acquiring assets?
A. Yes.
THE COURT: Who drafted what's on the screen?
THE WITNESS: I'm not sure who drafted it. I would have been part of the drafting team.
THE COURT: Of what firm?
THE WITNESS: Skadden Arps.
THE COURT: Do you remember whose view it was that all third-party buyers seeking to conduct due diligence regarding those businesses are representatives of Bean?
THE WITNESS: I don't. One thing, just looking at this document, there's a footer referring to New York server 6A. If I recall, Neal Stoll was on 6A. I was on 7A; so my guess is this originally came from Neal.
THE COURT: Well, whose idea was it that this was an important ground rule?
THE WITNESS: I believe this came from Neal, this language.
THE COURT: All right. I mean, do you think third-party buyers are representatives?
THE WITNESS: I suppose it's possible in the context they are, and probably not the best description of them, though.
THE COURT: In what context would a third-party buyer be a representative?

THE WITNESS: Where the third-party buyer is -- the main goal of the third-party buyer is to provide financing to the main purchaser of the business and, as such, representing that business' interest in acquiring the total target company is one way I would think of them representing the interests of the buyer.

THE COURT: If the main goal of the third-party buyer is to provide financing, that would be the main goal of the third-party buyer, is to provide financing for somebody else's purchase?

THE WITNESS: Main goal is probably a little broad, but I'm just imagining a situation where, for example, a private equity company and a strategic company join together to acquire a third company, that the strategic company does not have sufficient assets or capital to acquire the target and they -- so the private equity company essentially is providing financing while also acquiring assets.

So from the private equities standpoint, their main goal is likely to be acquiring the assets. From the strategic company's aspect, the main goal for them might be getting the private equity involved to help with the financing. So I guess it depends on the point of view.

THE COURT: So you think, under oath, of those scenarios or any of those scenarios, it would be accurate to refer to the third-party buyer as a representative of the acquirer?

THE WITNESS: It may be accurate. I don't know if it's the best description.

THE COURT: But this was Mr. Stoll's idea that this would be a good idea?

THE WITNESS: I think this was put together by Mr. Stoll.

THE COURT: Right, who was giving Mr. Stoll his marching orders?

THE WITNESS: The client.

THE COURT: The client. And do you know who the client he was dealing with?

THE WITNESS: Most of the time I believe he was interacting with Bernie Kury.

THE COURT: And what was his position at the time, Mr. Stoll?

THE WITNESS: Mr. Stoll was an antitrust partner at Skadden.

THE COURT: Okay. Senior to you?

THE WITNESS: That's correct.

THE COURT: Go ahead.

BY MR. WEINBERGER:

Q. The scenario you just described about the private equity company going in there to help buy the asset, that's not the scenario we are talking about here, is it?

A. No, I don't believe there was a private equity company involved.

Q. Abbott's primary goal was not to give money to Boston Scientific to allow it to consummate this transaction, was it?

A. I don't know that I can speak for Abbott, but my impression was that that would not be the primary goal.

Q. All right. So just to be clear, it was also Guidant's position, as expressed in this agreement, that any such third party had to sign the accession agreement before it would receive due diligence, right?

A. I don't think this is an agreement, but, yeah, it was Guidant's position that before a third party obtained due diligence, that they would sign the accession agreement.

Q. So when Abbott came on the scene, it was Guidant's position that Abbott had to sign the accession agreement before it received due diligence, wasn't it?

A. Yeah, just as it would have been if Johnson & Johnson or some other third party had come on the scene.

Q. And, in fact, during this period of time, Abbott threatened to walk away from any deal if it did not get the due diligence it requested, didn't it?

A. I remember hearing about a threat like that, yeah.

Q. But Abbott wouldn't sign --

THE COURT: From whom did you hear that?

THE WITNESS: I don't remember if I heard the threat directly from Abbott, I just don't recall, or indirectly through somebody else at Skadden or Guidant.

THE COURT: But the threat was what, as best you can recall?

THE WITNESS: That if Abbott didn't receive due diligence, that they would walk away from the transaction. Although, I'm not sure I found it credible, but ...

BY MR. WEINBERGER:

Q. But you actually reported that to Mr. Kury, didn't you?

A. I think that's right.

Q. If you look at John Exhibit 20, and in particular, the e-mail at the bottom of the page from you to Mr. Kury dated December 21, 2005, and the statement I'm interested in is in the next page and it says -- talks about some agreements that Abbott wanted to see, and it says, "Apple called having this accession critical and said if they were not given this access, they would walk from the field (but then they said that about a lot of things);" do you see that?

A. I'm sorry, can you just -- I'm having trouble finding it. Again, could you point that out?

Q. John exhibit --

A. I have the exhibit. I'm just trying to find it on the page, sorry. There we go.

Q. Can you look on the screen?

A. It just showed up, sorry.

Q. It's on the page in the numbered paragraph 4.
A. Okay. I see that.
Q. Okay. And that's the e-mail you sent to Mr. Kury?
A. Yes.
Q. Okay. Now, Abbott would not sign the form accession agreement that was attached to the addendum; isn't that right?
A. That's right.
Q. And you were involved in negotiating the terms of the addendum with Abbott, were you not?
A. Yes.
Q. And there were drafts going back and forth; is that right?
A. I don't -- I don't remember. I remember there being a lot of back and forth with Abbott, and ultimately Abbott sending a draft that was pretty close to what, if not identical, to what was ultimately signed. So I don't remember if there were drafts going back and forth. What I remember is that the one that was eventually signed came from Abbott, and it was signed in a form, if not identical, very close to the form that Abbott sent to us.
Q. I mistakenly said negotiating the terms of the addendum. I meant the accession agreement. Is your answer still the same?
A. Correct. I was referring to the accession agreement.
Q. If you just briefly take a look at John Exhibits 10, 11, 12, 14 and confirm to me that those are drafts going back and forth between you and Abbott of accession agreement? We don't

need to get to the substance. I just want you to identify them for me.
A. Okay. I see these -- there are some e-mails back and forth with attachments. I can't tell what changes have been made back and forth.
Q. I don't care what changes. It does reflect that this was an agreement that was negotiated between you and Laurie Gunther from Abbott, right?
A. The agreement was negotiated between the two. What I don't recall is the extent of any changes.
Q. I understand. Okay. Now, before Abbott signed this agreement, did you have a discussion with Laurie Gunther about it, about the statement that Abbott had been retained to advise Boston Scientific in connection with the proposed transaction?
A. Not that I recall.
Q. And you have no recollection of her objecting to that statement?
A. No, I don't.
Q. And you have no recollection of telling her that the statement needed to be there and that it was not open for negotiation?
A. I do not.
Q. Just to be clear, she has given that testimony; are you aware of that?
A. I am.

Q. And are you simply saying you don't recall that, or you deny that it took place?
A. I don't recall that taking place.
Q. So you don't deny what her testimony was, do you?
A. I just have no recollection. It's hard for me to accept it or deny it.
Q. Now, putting Ms. Gunther aside, you knew that that language was not correct, didn't you?
A. No.
Q. Look at Knopf Exhibit 34. You said no. You believed that Abbott had been retained to advise Boston Scientific in connection with this transaction; that was your understanding?
A. That wasn't the question. You asked -- I don't know that I formed a belief on that. I think a better description was, ultimately, in the accession agreement of Abbott being a purchaser of assets to be divested.
Q. Right. But what I'm asking you is whether, in fact, you knew that the statement that Abbott had been retained by Boston Scientific to advise it in connection with this transaction was false?
A. I did not know that it was false.
Q. Well, let's see.
A. I don't know today that it is false.
THE COURT: So you think Abbott was retained to advise Boston Scientific in connection with this takeover?

THE WITNESS: No, I'm not sure that I thought they were retained or not. I just -- the question was whether I know that it's false, and not knowing the full extent of the relationships between those two companies, I can't testify that it's false.

THE COURT: Well, the language is Abbott Laboratories, Abbott, has been retained by Boston Scientific to advise it in connection with a potential transaction.

THE WITNESS: Yes.

THE COURT: So you believe that to be true?

THE WITNESS: I don't know if it's true or if it's not true.

THE COURT: You believed at the time that this was a true statement?

THE WITNESS: I'm not sure I focused on it at the time.

BY MR. WEINBERGER:

Q. You had no information whatsoever to indicate that Abbott had been retained by Boston Scientific for anything; isn't that right?

A. I did not have any information about any agreement between the two of them, where Abbott had been retained by Boston, that's correct.

THE COURT: You knew they were a potential acquirer of a divestiture business, right? They were a divestiture partner potential?

THE WITNESS: Correct.

THE COURT: So you knew that much?

THE WITNESS: Yes, that's correct.

THE COURT: A minute ago you said that really isn't being retained; isn't that what you told me?

THE WITNESS: Correct.

THE COURT: Okay. So you, nonetheless, thought that Abbott might have been retained by Boston Scientific to advise it in connection with its acquisition of Guidant?

THE WITNESS: I think the language came from the formal accession agreement; so I didn't focus on it. I don't recall thinking about it at the time, if they were or weren't. The key language in the accession agreement that was signed, I felt, protected Guidant's interest from an antitrust perspective, and that's what I was focusing on at the time.

THE COURT: So it didn't matter to you whether this was true or not, that's what you're saying?

THE WITNESS: It wasn't something that I focused on. So it would matter to me to -- that things be as true as they possibly could, but the draft did come from Abbott. It ultimately was agreed to by Boston Scientific. I had no reason to -- specific reason to believe that it wasn't true.

THE COURT: Well, you did have some reason to believe that it wasn't true. You knew they were a potential acquirer of the divestiture business, right?

THE WITNESS: Yes.

THE COURT: You knew it?

THE WITNESS: That's correct, I did know it. Yes.

THE COURT: And you told me, just a minute ago, that that would really not be fairly characterized as retention to advise; isn't that what you told me?

THE WITNESS: That's correct.

THE COURT: Okay. Next question.

BY MR. WEINBERGER:

Q. If you look at Knopf Exhibit 4 -- 34, sorry. Could you confirm to me that Knopf Exhibit 34 is an e-mail that was sent to you by Larry Knopf of Boston Scientific, attaching a copy of the accession agreement signed by Boston Scientific?

A. Yes.

Q. And in that e-mail he says to you -- and Larry Knopf is an in-house lawyer at Boston Scientific, wasn't he?

A. I don't remember.

Q. You don't remember if he was an in-house lawyer at Boston Scientific?

A. No, I don't.

Q. All right. He said to you -- but he's sending this to you on behalf of Boston Scientific; is he not?

A. Yes, I believe so.

Q. And he's saying, "Please understand that Abbott is a

potential acquirer of certain assets of Guidant." Do you see that?
A. Yes.
Q. He was telling you in that e-mail that the characterization of Abbott as having been retained to advise Boston Scientific was erroneous, wasn't he?
A. I don't see him saying that here. He's definitely picking up the language from the Paragraph 1 of the accession agreement in which Abbott parties describe themselves as acquiring assets, as a potential acquirer of assets from Guidant.
Q. And that's why he told you to please understand that Abbott is a potential acquirer of certain assets, because the way you had it expressed in the accession agreement was wrong; isn't that right?
A. I don't know if that's why he put that in there.
Q. All right. Well, let's look at Knopf Exhibit 35. Knopf Exhibit 35 is an e-mail from Clare O'Brien of Shearman and Sterling, also sending you -- well, I don't know if she sent -- also sending you a copy of the accession agreement signed by Boston Scientific; is that right?
A. Yes.
Q. And she's telling you, "Ian, I would not characterize Abbott as having been retained by Boston Scientific to advise it in connection with the potential transaction. I would say in connection with Boston Scientific's consideration of a

potential transaction with Guidant, Abbott is considering the possible acquisition of certain assets of Guidant." Do you see that?
A. I do.
Q. She's also telling you that the characterization in the accession agreement is wrong, isn't she?
A. I don't see her saying that. I see her suggesting that it would be better to characterize them in this -- as a purchaser of divestiture assets.
Q. But you didn't understand her to tell you, when she said, I would not characterize Abbott as having been retained by Boston Scientific, et cetera, you did not understand her to be telling you that it was wrong?
A. I understood her to be telling me that a better description would be the second one that she includes here.
Q. Okay. So you got this e-mail from Mr. Knopf. You know who Clare O'Brien was? You remember who she was, don't you?
A. I remember she was a corporate attorney at Shearman and Sterling, if I recall.
Q. Who represented Boston Scientific?
A. That's my recollection.
Q. And even though you got these two e-mails, you didn't change this, did you?
A. Well, when I got both of the e-mails, the agreement had been signed by all three parties; so I assumed that everybody

who signed it was comfortable with it as it existed and --
Q. Well, two people --
THE COURT: Let him finish.
Q. I'm sorry. At least one party --
THE COURT: No, no. Let him finish.
MR. WEINBERGER: I'm sorry. I thought he was done.
THE COURT: No. "As it existed and"?
THE WITNESS: And the agreement, as it existed, as signed by all three parties, was appropriate from an antitrust perspective. To -- Put it this way, that the agreement set forth the necessary ground rules such that Guidant exchanging information with Abbott and Boston Scientific, pursuant to this agreement, would be consistent with Guidant's obligations under the antitrust laws, which is what I was focused on.
THE COURT: So if it said that Abbott Laboratories is an accounting firm that had been retained by Boston Scientific to advise it in connection with the potential transaction, you'd have been okay with that too because even though it's false, from an antitrust perspective, they still would be allowed to have this information?
THE WITNESS: I would have expected Abbott not to draft that about themselves, since this draft that we ultimately finalized came from Abbott.
THE COURT: And it's signed by Boston Scientific and Abbott and Guidant, right?

THE WITNESS: That's correct.

THE COURT: And Boston Scientific was your client, right?

THE WITNESS: No, my client was Guidant.

THE COURT: I'm sorry, Guidant, excuse me, was your client, right?

THE WITNESS: That's correct.

THE COURT: So it didn't bother you that your client was signing a document that is not accurate?

THE WITNESS: From my perspective, the agreement protected my client's interests from antitrust perspective, which, from my perspective, was the import of the agreement. And so from that perspective, I was comfortable that Guidant signing it was protecting its interests from an antitrust perspectives.

THE COURT: It makes representations, right, including that Abbott has been retained to advise Boston Scientific in connection with a potential transactions. You didn't think it mattered whether that was true?

THE WITNESS: In hindsight, it certainly would have been better to have changed the description, as Clare suggested.

THE COURT: And as Mr. Knopf is suggesting too, right?

THE WITNESS: As he suggested sending over the signed version of the agreement, yes.

THE COURT: And as Ms. Gunther claims she suggested before the thing was signed?

THE WITNESS: I've heard that she's testified to that, yes.

THE COURT: But you have no recollection?

THE WITNESS: No, I do not.

THE COURT: Okay. Go ahead.

BY MR. WEINBERGER:

Q. And so it would have been pretty easy to send around an e-mail to Laurie Gunther, Larry Knopf, Clare O'Brien, say, gee, we made a mistake. Let's agree to change this characterization of Abbott to be consistent with what Clare O'Brien puts in her e-mail. That wouldn't have been too hard to do, would it?

A. Drafting the e-mail and changing the language from a word processing perspective would have been fairly straightforward, but I was also mindful of this coming up on December 23rd, a couple of days before Christmas, the parties really wanted to get the due diligence accomplished, have Abbott have access to the due diligence in advance of Christmas. And this particular portion of the agreement certainly didn't seem to bother Abbott and Boston Scientific enough that they weren't comfortable signing the agreement.

I didn't view that provision as central to the main purpose of the agreement. I saw the first paragraph as describing Abbott as a potential purchaser of assets, and in that totality of the moment, raising that issue at that point, after a lot of effort to get there, didn't seem to me to be the best course. Although, I do remember sending a draft of it over to the corporate colleagues and the signatures coming in while we were waiting to hear back from them.

THE COURT: Corporate colleagues being whom?

THE WITNESS: Brian Duwe at Skadden, if I recall.

THE COURT: That was before or after the signed versions?

THE WITNESS: I think Abbott had already signed, but before Boston.

THE COURT: Do you recall any response from the corporate colleagues?

THE WITNESS: I don't. I recall the signature coming in from Boston very soon thereafter, very soon after --

THE COURT: But you don't recall discussing this with Mr. Duwe?

THE WITNESS: No, I do not.

THE COURT: Or Mr. Mulaney?

THE WITNESS: No, I do not.

THE COURT: Or Mr. Kearney?

THE WITNESS: No, I do not.

THE COURT: How about Mr. Stoll?

THE WITNESS: No, I do not.

THE COURT: Did you forward Clare O'Brien's e-mail to any of those persons?

THE WITNESS: That's the e-mail I remember sending to Brian.

THE COURT: To Brian. But you don't recall whether he even responded?

THE WITNESS: I don't recall if he responded, no.

THE COURT: Were you aware that under the terms of the Johnson & Johnson merger agreement, that the confidentiality agreement with any potential acquirer had to be no less restrictive than what Johnson & Johnson had signed?

THE WITNESS: I've heard that. I don't recall if I was aware of it at the time.

THE COURT: So that wasn't any part of your thinking when you were discussing with Boston Scientific and Abbott this accession agreement?

THE WITNESS: No. I was expecting that the corporate team would be thinking about that.

THE COURT: Okay. Go ahead.

BY MR. WEINBERGER:

Q. Okay. So just going back to the e-mails you got. There was no antitrust -- even though there was no antitrust reason to use that characterization of Abbott's role, you didn't think about just sending an e-mail saying, we can go ahead with the due diligence, but let's all agree that Abbott has not been retained to advise Boston Scientific but, rather, as a

potential purchaser of assets? You didn't think about doing that, did you?
A. No.
THE COURT: And just so we're clear, the language or close to it, was language that Mr. Stoll had identified as a ground rule for basically due diligence and accession agreements with potential acquirers, right?
THE WITNESS: I think the ground rule talked about representatives retained to advise, I guess would be a form of a representative; so from that perspective, so --
THE COURT: Could you just put back the exhibit we showed before? Do you know the one I'm referring to, Mr. Weinberger?
MR. WEINBERGER: Yes. Are you talking about the ground rules?
THE COURT: Yes.
MR. WEINBERGER: You're talking about Kury 71.
THE COURT: Kury 71. Could you put it on the screen?
MR. WEINBERGER: Yes. Could you put it on the screen, Marco? There it is.
THE COURT: All third-party buyers must sign the accession agreement, right?
THE WITNESS: Correct.
THE COURT: And the accession agreement that existed at this time was one that said, blank, has been retained to

advise Boston Scientific, correct?

THE WITNESS: That's correct.

THE COURT: As far as you know, were Abbott or Boston Scientific or anyone else insisting on the language that appeared in the accession agreement about being retained to advise?

THE WITNESS: Not to my knowledge, no.

THE COURT: So the language came from Skadden and Mr. Stoll in particular; is that correct?

THE WITNESS: The draft accession agreement that ended up being the form that was used here came -- was something that I recall Neal and I using in the past. I don't remember who drafted it originally. It might have been either Neal or me. It could have been another antitrust lawyer at Skadden, but that was the form that we had -- we had used in the past, and we decided to use here. So the exact genesis of that language, I don't recall.

THE COURT: All right. But whether the language in the past -- I mean, there may have been cases in which parties were retained to advise in connection with transactions in the past. But for purposes of this transaction, all third-party buyers seeking to conduct due diligence were expected to sign the accession agreement that had already been drafted with the language we've been talking about, right?

THE WITNESS: Yes. The goal was to make sure that third-party buyers acceded to the obligations that Boston had agreed to in the addendum, which were designed to protect Guidant's interests from an antitrust perspective.

THE COURT: How do you know that was the goal?

THE WITNESS: That was my recollection of at least my goal at the time and talking to Neal. Our role, as antitrust lawyers, is to make sure Guidant abided by its obligations under the antitrust laws.

THE COURT: But you don't know whether there may have been other goals that were relevant to the Johnson & Johnson merger agreement?

THE WITNESS: It was certainly not in my mind.

THE COURT: Okay. Next question.

BY MR. WEINBERGER:

Q. Okay. When Clare O'Brien sent you her e-mail, you didn't respond to her saying, this isn't an important change, did you?

A. I don't recall responding to Clare's e-mail.

Q. What you did is you sent it, and contrary to what you said to the Judge, you sent it already signed by all three parties to Brian Duwe, didn't you?

A. I had a recollection that I sent it before it was signed. Maybe I sent it after. I don't remember.

Q. Well, you forwarded her e-mail, didn't you?

A. Yeah, I thought I had forwarded Clare's e-mail before we received the signature from Larry Knopf, but I could be

misremembering.
Q. Well, she actually attached the accession agreement, signed by Boston Scientific, didn't she? It's attached to her e-mail, Exhibit 35?
A. Which exhibit? I'm sorry, Kury Exhibit 35?
Q. Knopf Exhibit 35. Her e-mail attaches a signed accession agreement, doesn't it?
A. The e-mail that she sent to Larry Knopf does. The e-mail that I'm looking at is the one that she sent to me and Alison, and I don't know if -- from just looking at the forwarded e-mail, whether the e-mail that's in the chain also included the attachment.
Q. Well, okay. Take a look at Duwe Exhibit 9.
A. Okay.
Q. This is the e-mail by which you forwarded Clare O'Brien's e-mail to you that was Knopf Exhibit 35. You forwarded it to Brian Duwe and Alison Rhoten, didn't you?
A. Yes.
Q. And when you forward it to them, you said, "Will you work this issue with Clare and Simpson, if necessary? I am not really sure how to address it at this point." Do you see that, sir?
A. I do.
Q. You didn't tell them, oh, this isn't important from an antitrust perspective. You said, work it with Clare, right?

A. Yes, that's right.
Q. Because you didn't know what else to do, right?
A. My -- from an antitrust perspective, the language wasn't something that I was focused on. If it was something that was important to Boston Scientific from that non-antitrust point, I would have suggested that the corporate folks who were interacting with Boston on those topics were in the best position to work the issue with Clare.
THE COURT: Simpson, if necessary, is a reference to whom?
THE WITNESS: I think Simpson there means Simpson Thacher.
THE COURT: They were representing?
THE WITNESS: Abbott.
THE COURT: Abbott. When you said, I'm not really sure how to address it at this point, what were you intending to convey?
THE WITNESS: That it was a fairly heavily negotiated agreement that, from an antitrust perspective, the terms were satisfactory to protect Guidant's interests from an antitrust perspective, that we had a signature from Abbott. From what I could tell, Abbott was comfortable with the agreement, and it had been difficult to get Abbott to the point where they were ready to sign an agreement.
And it's late in December, before Christmas, and there

was a desire to get moving with due diligence. And the thing that was holding up Abbott having due diligence was having a signed agreement. And at that point, I was expressing a little bit of frustration that from my point of view. How they wanted to have this particular provision is up to them, but we have one party signing it and another party saying maybe we should change this description.

In my view, Abbott and Boston should decide how they want that provision to happen and, you know, we'll go from there. But shortly after this e-mail, we got the signed version of the agreement from Boston Scientific, and my recollection is due diligence proceeded thereafter.

THE COURT: But you forwarded this to Duwe and Rhoten because, although you didn't have concerns from an antitrust perspective, you understood there might be other perspectives and other issues; is that correct?

THE WITNESS: That portion of the agreement wasn't fundamental from an antitrust perspective, and if, from a corporate perspective, folks wanted to change it and they wanted to go through the process of further negotiating this agreement, that was up to them. From an antitrust perspective, I thought that the agreement was fine with either of those two descriptions.

BY MR. WEINBERGER:

Q. You knew at the time you forwarded this to Mr. Duwe, you

knew that Boston would be willing to make that change, didn't you, since two lawyers from Boston Scientific had told you that you weren't characterizing it correctly; isn't that right?
A. I think when I sent this to Brian, only Clare had suggested it, but certainly Clare was representing Boston Scientific. And her suggesting the change would suggest to me that Boston was okay with the change.
Q. And if Miss Gunther is telling the truth Abbott was not only willing to make that change, it was asking to make that change, if she's telling the truth?
A. Yeah, I don't recall that.
Q. And so the fact that it was a couple of days before Christmas wasn't really an obstacle to getting this thing changed?
A. I don't recall that.
THE COURT: Did you discuss this with Mr. Stoll?
THE WITNESS: I don't recall that.
THE COURT: Did you ever hear back from Mr. Duwe?
THE WITNESS: Not that I recall.
THE COURT: Did you ever hear back from Ms. Rhoten?
THE WITNESS: Not that I recall.
BY MR. WEINBERGER:
Q. And it never got changed, did it?
A. I don't believe the language was changed, no.
MR. WEINBERGER: Your Honor, unless you have more

questions about this, I'm going to move on to something else.

THE COURT: No, that's fine.

BY MR. WEINBERGER:

Q. Mr. John, you were aware -- were you aware of the requirements of section 4.02(C) merger agreement that J&J be notified by any takeover proposal or the status and details of any takeover proposal?

A. Generally aware of it, yes.

Q. And do you agree that the accession agreement that was signed by Guidant, Abbott and Boston Scientific was related to the Boston Scientific takeover proposal?

A. Yes.

Q. And am I correct that you did not advise anyone at or on behalf of J&J that Abbott had signed the accession agreement?

A. I don't recall.

Q. Could you -- In the back of your exhibit book you'll see a tab for your deposition.

A. I'm sorry, which book, the binder or this?

Q. The binder, the back of the binder. There should be a tab that says "Deposition."

A. Yes.

Q. Can you turn to Page 134, beginning at Line 23. Would you just let me know when you get there?

A. Line 23?

Q. Line 23. I'm going to ask you if I asked you -- You

remember I took your deposition?
A. Yes, I do.
Q. Back in 2010?
A. Yes, sir. I remember.
Q. Did I ask you the following questions and did you give me the following answers:
"Q. Did you advise anyone from J&J that Abbott had entered into an accession agreement with Guidant?
"A. I did not advise anyone at J&J that Abbott had entered into an accession agreement with Guidant."
Did you give me that testimony?
A. Yes, I did.
Q. Now, did you also understand that Guidant information that was shared during due diligence was required to be provided to J&J, or if it was highly sensitive, to J&J's lawyers at Cravath?
A. I remember -- I don't remember the metes and bounds of the obligations or there being an obligation to show information with J&J that we shared through due diligence.
Q. Could you look at John 28. That's a letter from Linda Cenedella, C-e-n-e-d-e-l-l-a, she was an associate at your firm?
A. She was an associate at Skadden at the time, yes.
Q. She worked in your group?
A. She was an antitrust lawyer, that's right.

Q. And she's sending, on December 20th, diligence materials for Guidant that are stated to have been provided to Boston Scientific or their advisers; do you see that?
A. I do.
Q. And this is -- December 20th is before any due diligence has been given to Abbott; is that right?
A. I think that's right.
Q. And if you look at John Exhibit 29, it's a letter from Jakub Teply, J-a-k-u-b, T-e-p-l-y to Cliff Birge at Johnson & Johnson, dated December 22nd, enclosing some additional materials that were stated to have been provided to Boston Scientific; is that right?
A. Yes.
Q. And this also would likely have been before any due diligence was provided to Abbott, would it?
A. Yes.
Q. And then if you'd look at John Exhibit 30, another letter on the same date from Kevin Hahm, H-a-h-m, to Cravath, also enclosing materials provided to Boston Scientific or their advisers; do you see that?
A. I do, yes.
Q. And Mr. Hahm was an associate at Skadden?
A. Correct.
Q. In the antitrust group?
A. That's correct, at the time.

Q. And this also would not likely have contained any materials that were shown to Abbott, given the date of this letter; is that right?
A. That seems right, yes.
Q. Now, I'd like you to look at John Exhibit 31. It's another letter from Mr. Hahm to Cherylyn Ahrens at Cravath, but this one is dated December 30th; do you see that?
A. I do.
Q. It says, "Enclosed please find additional diligence materials for Guidant Corporation. These materials have been provided to Boston Scientific or their advisers in connection with the diligence review." Do you see that?
A. I do.
Q. And are you aware that -- do you know that these materials were actually materials that were given to Abbott?
A. I don't know.
Q. All right. Well, why don't you take a look at Stoll Exhibit 27. Are you there, Mr. John? Do you have it?
A. Yes, I do.
Q. Do you see this is an index of Guidant Corporation materials sent to Cravath?
A. That's what it looks like, yeah.
Q. And do you see on the third item the date of December 30th, '05, it says Abbott DES diligence, diligence sent by K. Hahm?
A. I see that.

Q. That's the date of the letter we just looked at, John Exhibit 31?
A. It is, yes.
Q. Would you also look at Stoll Exhibit 24. Do you see that the front page is a second e-mail, it's an e-mail from Mr. Hahm to you dated January 3rd?
A. Yes.
Q. And Mr. Hahm tells you, here is the binder of materials from Abbott's DES due diligence in Santa Clara next week -- last week; do you see that?
A. I do.
Q. And do you see on the second page it says, "Guidant project Bean DES due diligence performed by Abbott December 27th, 2005"?
A. Yes.
Q. And the fourth line it says, "Documents shared with Abbott"?
A. Yes, I see that.
Q. And then in the footnote it says, "All documents provided to Abbott were also sent to Cravath;" is that right?
A. I see the language there, yes.
Q. And there's very little doubt those were the documents that were provided by Mr. Hahm with his letter that's been shown to you as John Exhibit 31?
A. That seems likely.

Q. The one that says that these materials have been provided to Boston Scientific and its advisers?
A. Yes, it looked like Kevin kept using the same form letter.
Q. But these materials weren't even given to Boston Scientific, were they?
A. I don't know.
Q. The DES materials, you know, were not given to Boston Scientific; do you know that?
A. I don't know that.
Q. Now, do you recall testifying in your affidavit about a call that Neal Stoll received from two lawyers at Johnson & Johnson, Eric Harris and Jim Hilton, on January 6th, 2006?
A. Yes.
Q. And that testimony is at paragraph 26, right?
A. I'm sorry, paragraph 26 of?
Q. Of your affidavit.
A. Of my affidavit, sorry. Yes, I see that paragraph.
Q. Okay. And the e-mail that you wrote to Mr. Kury summarizing this call is Harris Exhibit 12, right? If you turn to that.
A. I have it in front of me. I'm sorry, what was the question again?
Q. I just want to know if this is an e-mail that you sent to Mr. Kury summarizing the call that you're describing in the e-mail?

A. That I'm describing in paragraph 26?
Q. Yes.
A. Yes, that's right.
Q. And do you recall, as it states here in this e-mail and as you state in your affidavit, that during the call, Mr. Hilton commented that he thought Boston Scientific's divestiture buyer was Abbott?
A. I'm sorry, could you ask that question again?
Q. Yes. Your call, as is stated in this document and as you've testified in your affidavit in paragraph 26, that during this call Mr. Hilton commented that he thought Boston Scientific's divestiture buyer was Abbott?
A. I recall hearing that. I just don't remember if I was on the call itself.
Q. Well, you wrote this e-mail?
A. That's correct. It's possible that Neal relayed the contents of the call to me and I put it in the e-mail, Neal signed off on the e-mail, and I sent it to the client.
Q. Okay. But the e-mail does state that Mr. Hilton raised this question?
A. The e-mail states that Hilton hypothesized it was Apple, yes.
Q. And you actually made a point of saying that in your affidavit, paragraph 26. You said, "The e-mail summarized highlights of the call, including that Mr. Hilton commented

during the conversation that he thought Boston Scientific's divestiture was Abbott, for which we used the code name Apple." Do you see that?
A. Yes, I do.
Q. And you put that in there to suggest somehow that J&J knew what was going on between Guidant and Abbott?
A. I think we just put it in there to accurately reflect that we had heard from J&J that they believed that the divestiture buyer was Abbott.
Q. Well, there's a lot of stuff going on in this telephone call. This is the only thing you pointed to in your affidavit; is that right?
A. I think that's right.
Q. And you're not suggesting here that Mr. Hilton knew that or said he knew that Guidant was providing diligence to Abbott, are you?
A. I don't believe that's what I'm saying in this e-mail, no.
Q. And, in fact, the response to Mr. Hilton's speculation by Mr. Stoll was to neither confirm nor deny it; isn't that right?
A. That's what I wrote in my e-mail, yeah.
Q. Even though Mr. Stoll, obviously, knew on January 6th that it was, indeed, Abbott?
A. He knew on January 6th that Abbott had been proposed as the divestiture buyer, that's correct.
Q. Now, in that same e-mail, you tell Mr. Kury that Mr. Harris

and Mr. Hilton asked Neal Stoll if there had been any discussion about divesting the co-promote and that Neal said, not to his knowledge; do you see that?
A. Yes.
Q. And you knew when you wrote that e-mail, that that was a false statement, didn't you?
A. I don't recall.
Q. You knew that there had been discussions about divesting the co-promote agreement between Boston Scientific, Abbott and Guidant, didn't you?
A. I vaguely remember there was some discussion of the co-promote. I don't remember when it happened or what the contents of those discussions were.
Q. Well, let's look at John Exhibit 20. Do you see John Exhibit 20, the first full e-mail on the bottom of the first page is an e-mail addressed by John Capek to you?
A. I see that.
Q. And John Capek was a pretty senior guy at Guidant, wasn't he?
A. He was a senior tech at Guidant. I think he was in the vascular intervention business at the time.
Q. And he specifically asked you, "Have they asked about the co-promotion agreement and its transferability?" Do you see that?
A. Yes, I do.

Q. And the "they" was Abbott, wasn't it?
A. Yeah, that appears to be the case, yes.
Q. And then your response is up on top, and your response is, "They have asked for copies of all licenses and related agreements, including the co-promote, to be placed in the data room as category 2 materials." Do you see that?
A. I do.
Q. It's very clear that Neal Stoll's answer to Mr. Harris and Mr. Hilton that he didn't know about the -- whether this issue had been raised is not true. He's copied on these e-mails, isn't he?
A. The e-mail, I think, refers to a discussion about divesting the co-promote. The e-mail you just pointed to me talks about having access to the co-promote in the diligence room. I don't necessarily view those as exactly the same.
Q. Well, Mr. Capek's question is about transferability of the co-promotion agreement, isn't it? Abbott wanted to know if it bought the VI and ES assets, would it also be entitled in part of that divestiture to co-promote agreement.
A. John asked me, have they asked about the co-promote's transferability, and what my e-mail says here is -- here I said, they've asked for a copy of the agreement. I don't know that that means they've asked us about its transferability.
Q. All right. Let's explore that, Mr. John. You knew, did you not, that the co-promotion agreement between J&J and

Guidant had a confidentiality provision, didn't you?
A. Sitting here today, I recall there being confidentiality provisions in that agreement or the series of agreements. There were a bunch of agreements that J&J and Guidant had entered into. One of them was a co-promote agreement. I just can't remember which provisions were in which agreement.
Q. Okay. Would you take a look at John Exhibit 13. It's John Exhibit 13. The top e-mail is an e-mail that you sent to Mr. Kury on December 22nd, 2005; is that right?
A. That's correct.
Q. And in the middle of that e-mail there's a sentence that is now being highlighted on the screen that says, as follows: "We continue to need to consider, however, the confidentiality clauses in the license and related agreements, in particular, the limitations imposed by the Juice agreements. John Lapke and I just discussed that issue and think it would be worthwhile for a group; i.e. John L, Bernie, Brian and me, to discuss the various risks of meeting Bean's and Apple's requests to share those agreements with in-house counsel." Do you see that?
A. I do.
Q. And it was after the discussion -- was there such a discussion?
A. I don't recall.
Q. In any event, it was after this e-mail that the agreement

was made available to Abbott in the data room as indicated by John Exhibit 20; is that right?
A. I think my e-mail says we have done that. Sitting here today, I can't remember if it happened or it didn't.
Q. Well, your e-mail says it. You have no doubt that it happened, do you?
A. Not necessarily. There are times in my e-mail that it would have said we've done it when, in fact, when I check with the corporate folks, that actually it hadn't been put in yet. A lot was going on in a very short period of time here, and so sometimes my e-mails weren't exactly up to speed. This may have been one of those times. I just don't know.
Q. You have no reason to believe that when you said in an e-mail, "we've made it available in the data room," you have no reason to believe that that's not true?
A. There were other e-mails I think I sent during this time period, I'm just thinking about the confidentiality, potentially waivers of confidentiality that -- between FTC and other agencies that I may have said we sent along, and we ended up not sending; so that's why I just don't know.
MR. WEINBERGER: Your Honor, if I could just have one second. My documents are coming out of the book. I'm just going to hand it to somebody to put it together.
THE COURT: Okay.
BY MR. WEINBERGER:

Q. Mr. John, could you look at Plaintiff's Exhibit 9 in your binder. Now, you told me that -- a statement that there wasn't any discussion of divesting the co-promote. You didn't know if that was inaccurate because you didn't know if the issue of transferability had been discussed. I'd like you to look at the bottom e-mail. It's an e-mail from Mr. McConnell to Mr. Kury that then gets forwarded to you. Do you see that?
A. Yes, I see that.
Q. And on that e-mail Mr. McConnell says, "Abbott wants access to schedule from the Cordis co-promotion agreement that shows whether Juice can cancel the agreement if we're sold to Bean or Apple." Do you see that?
THE COURT: Do you see it?
A. Yes. I'm sorry, I'm just trying to get there. Yes, I see that.
Q. And the reason they wanted the schedule is they wanted to know whether they get the co-promotion agreement if they buy these assets; isn't that right?
A. I think you'd have to ask Abbott. That strikes me as a reasonable interpretation.
Q. And then it goes on to say, "They are listed on the schedule and are excluded. I am sure there is a confidentiality protection that prevents us from giving them the schedule, but we need to find a way to let Apple know that they're on the schedule while avoiding others that are listed.

Can we just tell them or can our attorneys tell their attorneys that they are listed?" Do you see that?
A. I see that.

(Continued on next page)

Q. See that Mr. Kury then sent it to Mr. Duwe with a question mark. He actually sent it to Mr. Duwe and to you with question marks. Is that right?
A. I see that.
Q. Then Mr. Duwe said, "Well, we called them."
Do you see that?
A. I see him saying that the Confi provisions of the co-promoted are more general; they do not expressly apply to the terms of the agreement or schedules. And so I view this as Brian took a look and is advising Bernie his views as to the applicability of the Confi provisions, which is what I would have expected from a division of labor perspective to happen as I was focused on the antitrust issues, not on the -- and the corporate team would be focused on other issues including the Confi provisions.
Q. You were the one that raised the confidentiality agreement in your email to Mr. Kury and suggested a meeting. Isn't that right, John Exhibit 13?
A. Yeah, I recall flagging the issue, but ultimately would have been relying on the corporate folks to run it to ground.
Q. Do you recall when you flagged that issue, that the confidentiality provision of the co-promote agreement said that the material terms of the agreement were confidential and not to be disclosed without the consent of the parties?
A. I don't recall the content of the confidentiality

provision.
Q. Would you agree with me the question of whether or not the agreement could be assigned or transferred if the business was bought is a pretty material term?
A. It may be; it may not, depending on the facts and circumstances. It's kind of getting outside my area of expertise.
Q. It was material enough for Abbott to want to know about it pretty badly, wasn't it?
A. I'm not sure how badly they wanted to know about it.
THE COURT: Well, they wanted to know about it, right?
THE WITNESS: I believe they did, yes.
THE COURT: That's what this email chain reflects, right?
THE WITNESS: They were interested in knowing about it, yeah.
THE COURT: Had you had discussions other than what's in this email chain?
THE WITNESS: I don't recall talking about it. Sitting here looking at this email, I don't recall the discussions.
THE COURT: OK. Go ahead.
BY MR. WEINBERGER:
Q. Going back now to Harris Exhibit 12, that is the email that you wrote to Mr. Kury of the call between Mr. Stoll and

Mr. Harris. In that same email, you wrote that Messrs. Hilton and Harris during the call had asked about what rights Boston Scientific was seeking to retain in Guidant's VI business, didn't you?
A. Yeah, they were asking about what DES intellectual property Boston would license back.
Q. And just one day before this email, you had corresponded Mr. Kury as to what you should say if you were asked about this by J&J. Isn't that right?
A. I don't remember the timing, but that sounds right.
Q. Take a look at Stoll Exhibit 19.
A. OK, I've looked at it.
Q. And you see the bottom, Mr. Kury is writing to Mr. Deyo responding to a question about Section 5.03 of the draft merger agreement and he says, "I suggest that you have one of your lawyers give Neal Stoll or Ian John a call, and they will describe our understanding of what Boston Scientific is seeking re retained rights to the VI business."
Do you see that?
A. I do.
Q. Above that you respond to Mr. Kury and you say, "Neal and I have questions about your second paragraph, given we only know what we learned in the course of a privileged conversation."
Do you see that?
A. I do.

Q. We will discuss this later, but the privilege that you were talking about here was a result of an oral defense agreement that had been entered into between Abbott Guidant and Boston Scientific. Isn't that right?
A. I don't know if it was -- if Abbott would have been incorporating that oral joint defense agreement in this context or whether it was just Guidant and Boston, but I do recollect or recall an oral defense agreement between Guidant and Boston, yes.
Q. So the privileged information had to come from some communication either from Boston or Abbott as to what it is they were talking about regarding Boston Scientific interest and retaining rights to the DES business, right?
A. Correct.
Q. Then Mr. Kury told you to discuss it with Mr. Mulaney and give him a recommendation, right?
A. Yes.
Q. And you did that, right?
A. I don't remember doing it, no.
Q. Well, the next email is from you to Mr. Kury, and it says as follows: "If called, we would plan to say that we know nothing more specific about Boston's demands in this area than has been shared publicly; that is, that Boston wants shared rights to Guidant's DES program. We have not yet learned any details about what exactly that means." Is that right?

A. That's what he wrote here, right.
Q. That's what Mr. Stoll told Mr. Harris and Mr. Hilton when they asked him that question that very next day. Isn't that right?
A. I don't remember that, no.
Q. Did you provide Guidant confidential information to the FTC prior to termination of the J&J merger agreement?
A. Yes. Just looking back at my summary email on January 6, I don't see us saying that -- we only know what's in the -- available in the public domain.
THE COURT: What exhibit are we looking at?
MR. WEINBERGER: Harris Exhibit 12.
Q. Here is what it says: "Neal walked them through 5.03, and they understood most of the provisions, although they were wondering about Schedule 5.03, which is meant to list the DES IP Bean will license back from divestiture buyer of the VI/ES businesses (Hilton hypothesized it was Apple; Neal neither confirmed or denied the speculation) Neal explained that we have not seen it yet, but that we understand our obligation to share it with them when we do so."
Is that what he said?
A. That's what I wrote in the email, yeah.
Q. The submissions that were made to the FTC were voluntary, weren't they?
A. I believe that's right.

Q. And if you look, for example, at John Exhibit 39, the second page, the re line on the email says "FTC voluntary submission." Is that right?
A. The subject of Kevin's email on the second page is FTC voluntary submission, yes.
Q. As of the time of this submission, Exhibit 39, Boston Scientific had not made a Hart-Scott-Rodino filing. Is that right?
A. I think that's right. I don't remember the specifics, but I think that's right.
Q. In fact, they didn't make such a submission until after a merger agreement was signed between Boston Scientific and Guidant?
A. Again, I don't remember the specifics, but that sounds right.
Q. Now, in this submission that was made on January 12, the information that was provided here was highly confidential Guidant business information, wasn't it?
A. Correct.
Q. If you would look at John Exhibit 38, that was another submission that was made on a voluntary basis to the FTC of highly confidential Guidant business information. Isn't that right?
A. Yes.
Q. This submission was made in connection with a tentative --

withdrawn -- in connection with a Boston Scientific offer that had not been accepted by Guidant at the time. Isn't that right?
A. I don't remember the timing of Guidant's acceptance of Boston's offer, so I don't know for sure.
Q. Well, let me see if I can get you to agree to this. This submission was made at a time when the Guidant/J&J merger agreement was still in effect and had not been terminated?
A. That sounds right. I don't remember the timing of that event, but that sounds right.
Q. You made Mr. Kury aware that Skadden was sending Guidant confidential information to the FTC, didn't you?
A. I'm sure I did, yeah.
Q. If you look at John Exhibit 41. In your email to Mr. Kury on the bottom of the page here, you're basically telling him that the FTC has asked if they can share the material that you previously sent to them with foreign regulatory agencies. Isn't that right?
A. Yeah, it's asking -- the FTC has asked whether they can -- whether Guidant would waive FTC's confidentiality obligations so the FTC could speak to foreign regulatory authorities about Guidant confidential information.
Q. And you told Mr. Kury that one of the benefits of this was that it would speed the FTC's review for potential transaction between Boston Scientific and Guidant, didn't you?

A. Yes.
Q. And that would make Boston Scientific's proposal more attractive to Guidant, wouldn't it?
A. I'm sorry, more attractive than?
Q. Than if -- more attractive to Guidant to have a proposal where the antitrust review would happen faster than slower. Isn't that right?
A. Yeah, I think generally the clients would prefer the regulatory process to be over as quickly as possible. It's not always the case but generally that's true.
Q. And Mr. Kury then authorized you to proceed?
A. He does, yeah.
Q. Now, again, January 20, would you agree with me that on that date the Guidant/J&J merger agreement still had not been terminated?
A. I don't remember.
Q. Well, I will represent to you that it was on January 25, so--
A. It was what?
Q. January 25. So it would be clear this was all happening while the J&J/Guidant merger agreement was still in effect. Is that right?
A. Yeah, I have no reason to doubt your representation, but that sounds right.
Q. Mr. John, you did not discuss with Mr. Kury or anyone else

at Guidant whether this was permitted. By "this" I mean supplying information to the FTC voluntarily while the J&J/Guidant merger agreement was still in effect, whether that was permitted by the J&J/Guidant merger agreement?
A. I don't recall any such discussions, no.
Q. In fact, you did not consider whether under the merger agreement Guidant was permitted to take actions that would help Boston Scientific speed its application through the FTC in the event that Boston Scientific and Guidant entered into a merger agreement, did you?
A. I'm having trouble following that question, but I didn't focus on the non-solicitation provision in connection with providing Guidant information to the Federal Trade Commission.
THE COURT: As far as you know, was anybody focused on that?
THE WITNESS: My expectation was the corporate folks were thinking about Guidant's obligations to J&J under the merger agreement; that provision in particular.
THE COURT: But I'm looking at your email here, which is John 41. Were corporate folks cc'd in this email chain?
THE WITNESS: I don't see them on this email chain, no, your Honor.
THE COURT: So when the original message from you to Mr. Kury cc's Linda Cennedalla, she is antitrust?
THE WITNESS: Correct.

THE COURT: Kevin Hahm, he's antitrust.

THE WITNESS: Correct.

THE COURT: Henry Huser, antitrust?

THE WITNESS: European competition is what Skadden called at the time similar role.

THE COURT: Giorgio Motta, same thing?

THE WITNESS: Correct.

THE COURT: And Mr. Kury and Neal Stoll.

THE WITNESS: Right. That's who is on this email chain. I recall interacting with a corporate team throughout this process and certainly would have made them aware of the FTC's request for information and our recommendation from an antitrust perspective to respond to those requests.

THE COURT: OK. Go ahead.

BY MR. WEINBERGER:

Q. Mr. John, is it correct that you did not solicit any opinion from anyone else at Skadden as to whether providing information to the FTC at that juncture; that is, prior to termination of the J&J/Guidant merger agreement, violated the J&J Guidant merger agreement?

A. One of the what I just mentioned was that we would have interacted with the corporate team, Brian and Chip, about the FTC's request and our recommendation from an antitrust perspective to respond to those requests. And if Chip or Brian or the other members of the corporate team believed that there

was a reason not to provide that information, for example, if it's the case that Guidant shouldn't provide that information because of the Johnson & Johnson merger agreement, I would have expected them to alert me to that.
Q. Does that mean you did not specifically seek any advice as to whether you could do that?
A. I don't recall asking them about Section 4.02 of the merger agreement and whether or not it applied to Guidant providing information to the FTC in response to their request.
Q. So you did not solicit any advice from them with respect to that issue. Is that correct?
A. In making them aware of the FTC request, there would be an implicit request from their perspective: Let me know if there is a reason not to provide this information.
Q. I didn't ask you about an implicit request. I asked you about an explicit request.

THE COURT: I don't think you specified, actually, but you can ask now.

Q. Did you make an explicit request for any opinion or advice from anyone else at Skadden as to whether providing materials to the Federal Trade Commission while the J&J/Guidant agreement still was in existence, still was effective, in connection with the Boston Scientific proposal or offer violated the Johnson & Johnson/Guidant merger agreement?
A. I don't recall making such an explicit request, no.

Q. Now, you now testify in your affidavit, however, that you would have so advised Guidant had you thought of it, right?
A. Sorry.
Q. The second paragraph, 29 of your affidavit state as follows: "In my experience it is not unusual for a client to respond to the FTC's information requests. Although I do not recall discussing the FTC's January 2006 request with Guidant directly, I have no reason to doubt that if I did, I would have advised Guidant to respond as I did. I do not recall anyone raising a concern about whether providing information to the FTC in response to its inquiries was prohibited by the merger agreement."
Do you recall giving that testimony?
A. Yes.
Q. And is the sole ground for this that it is not unusual for a client to respond to the FTC's information requests?
A. The basis of my recommendation or my suggestion here that I would have advised Guidant to respond is that in my experience as an antitrust lawyer engaging with the FTC staff, typically it's more effective for the client to engage cooperatively with the staff, which in my experience means responding to their request for information on a voluntary basis.
Q. Does it matter to you if provision of that information is prohibited by a contract?
A. It --

Q. Would that matter to you?
A. Yes.
Q. Are you aware that under Section 4.02(A)(2) of the merger agreement, Guidant was prohibited to furnish to any person any information or otherwise cooperate in any other way with a takeover proposal except to give due diligence to the party making the proposal and its representatives and to have discussions and negotiations with the party and its representatives? Were you aware of that?
A. I am aware generally of the non-solicitation provision in that it limited information flow; but the specifics in the way you described it, no.
Q. And you wouldn't be telling us that the Federal Trade Commission is a representative of Boston Scientific, would you?
A. No.
Q. Boston Scientific, what they were essentially doing having not made a Hart-Scott-Rodino filing, they're just previewing this transaction with the Federal Trade Commission. Isn't that right?
A. I don't know about previewing. They were engaging with the Federal Trade Commission in advance of filing Hart-Scott-Rodino Act notification report form which is not an unusual approach.
Q. And Guidant was facilitating whatever it was the FTC was doing by sending the FTC voluntary Guidant highly confidential business information, wasn't it?

A. Guidant was responding to the FTC's request for information on a voluntary basis.
Q. You could have said, "We can't do this. You know we have a contract with J&J, and we're not allowed to give you any information unless and until we terminate that agreement." You could have said that, couldn't you?
A. If that had been the case, and I'd been made aware that that was the case, and that was the interpretation of the agreement, I absolutely could have said that, yes.

MR. WEINBERGER: Your Honor, I have I think about 15, 20 minutes left. And it is a convenient stopping point if that will work.

THE COURT: All right. Let's pick up at 2:00. All right? I guess I will just advise you, Mr. John, that you are on cross so don't discuss the substance of your testimony with any one. You can talk about lunch plans things like that, talk about the Jets. But you can't talk about the substance of your testimony. All right?

THE WITNESS: Understood.

THE COURT: Thanks. See you in a little bit.

(Luncheon recess)

AFTERNOON SESSION

2:00 p.m.

(In open court)

THE COURT: Let's proceed.

CROSS EXAMINATION CONTINUED

BY MR. WEINBERGER:

Q. Mr. John, you testified this morning that you did not know whether the co-promote agreement between J&J and Guidant had been placed in a data set. Is that right?

A. Correct.

Q. Let me hand up to you a document that has been marked as Stoll Exhibit 25.

THE COURT: Not in the binder?

MR. WEINBERGER: It's not in the binder.

Q. This is an email from you to someone named Gary Schneiderman and John Lapke, and one of the things you are attaching is the Apple data room index and supplement listing all the materials shared with Apple thus far. Is that right?

A. Yes.

Q. It's dated January 5?

A. Yes.

Q. If you look at page 3 of 12, which is Bates number 79459, you see the item A37 is the sales promotion agreement between ACS, GCS, Cordis Corporation and Cordis LLC dated February 24, 2004. That is the co-promote agreement we have been talking about, isn't it?

A. It sounds like this.

Q. I asked you earlier about oral defense agreement. You were aware that there was an oral defense agreement entered into

between Boston Scientific and Guidant?
A. I'm sorry, could you ask that again? I was just looking at this document.
Q. You were aware, were you not, that there was an oral defense agreement entered into in December 2005 between Boston Scientific and Guidant?
A. Yes.
Q. And you were aware that at some point Abbott became a party to that agreement. Is that right?
A. It sounds right, I don't remember that happening, but it sounds like it may have.
Q. Are you aware that under the merger agreement, there are prohibitions against Guidant entering into certain kinds of agreements other than a confidentiality agreement referred to in Section 4.02(A). Are you aware of that?
A. I don't remember that, no.
Q. Do you agree that an oral joint defense agreement would be related to the Boston Scientific takeover proposal?
A. Yes.
Q. Is it correct that you did not provide any advice to Guidant as to whether Guidant was permitted to enter into an oral joint defense agreement that Boston Scientific and Abbott -- I did the same thing yesterday. Let me start over again.
Is it correct that you did not provide any advice to

Guidant that prior to termination, prior to termination of the J&J/Guidant agreement, Guidant was permitted to enter into an oral joint defense agreement with Boston Scientific?
A. I did not provide any such advice.
Q. And you don't know if anyone else did. Is that right?
A. I don't know.
Q. Now, is it correct that Guidant's desire was to have a high degree of certainty that any transaction with Boston Scientific would be completed as quickly as possible?
A. I think in any transaction that Guidant might enter into, it was its desire to complete it as quickly as possible. I don't remember hearing specifically from Guidant about its desire with regards to Boston Scientific. It wouldn't surprise me if that was their desire, but I don't remember sitting here today hearing that.
Q. Could you turn to your deposition on page 194. I will direct you to line 15 and ask you whether I asked you the following question and whether you gave meet following answer:
"Q. Do you know that Guidant was concerned that any offer from Boston Scientific had a very high degree of assurance of FTC approval?
"A. I believe Guidant's desire was to have a high degree of certainty that any transaction with Boston Scientific would be completed as quickly as possible."
Did you give me that testimony?

A. I did, yes.
Q. Is it true also that having an agreement in place between Boston Scientific and Abbott would make the antitrust approval process faster?
A. What kind of agreement?
Q. Having an agreement in place between Boston Scientific and Abbott regarding divestiture of the VI and ES assets would make the antitrust approval process faster?
A. It might.
Q. You have been involved -- it might or it would?
A. It might.
THE COURT: It likely would? Is that fair to say?
THE WITNESS: Boston Scientific and Abbott -- most likely it would, yes.
THE COURT: OK.
Q. And you have been involved in transaction -- and that made Boston Scientific's offer of January 8 more attractive to Guidant, didn't it?
A. I don't know.
Q. Well, if Guidant wanted to have high degree of certainty that any transaction would be completed as quickly as possible, and having an agreement in place between Boston and Abbott would make the antitrust approval process faster, it stands to reason that that would make Boston's offer more attractive, doesn't it?

A. If the only difference in Boston's offer were having an agreement with Abbott and not having an agreement with Abbott and Guidant was interested in moving more quickly and that made it move more quickly, then that would be a positive development from Guidant's perspective, I would imagine.
Q. But you have been involved in your career in transactions where an offer is made, there's a potential divestiture, and the company to whom the assets are to be divested is not identified. Isn't that right?
A. Correct.
Q. And there are other situations where a potential purchaser is identified but with a non-binding agreement subject to due diligence. Isn't that right?
A. I'm sorry. Can you just walk through that hypothetical again?
Q. Another scenario would be where the acquirer has identified a potential purchaser of divested assets who signs like a non-binding letter of intent subject to due diligence?
A. I'm sorry, I'm just trying to place that in the whole time frame of things. I just don't trying exactly what you're asking I'm not following what you're asking.
Q. I'm asking you, in your career you've seen transactions where an acquirer who needs to make a divestiture doesn't sign up the divestiture party in advance but has a non-binding agreement with the divestiture party subject to due diligence.

A. Possibly, but putting that in the whole time frame relative -- the way I think about these issues is less subject to due diligence than where is the what I call the main transaction, the transaction between the buyer and the target is in the regulatory review process. And I have been involved in transactions where the buyer has entered into an agreement with the FTC, for example, to divest certain assets and has not identified a buyer for those assets prior to closing the main transaction. That's what comes to mind. That is why I am just having trouble following your hypothetical.

Q. Sometimes there are situations where someone makes an offer and the divestiture requirement is -- there is a requirement in the agreement to make a divestiture, but they don't have a binding agreement with the divestiture party at the time, at the time they make the offer, right?

A. I have been involved in situations where the main deal closes before the divestiture -- before the buyer of the target has entered into a definitive agreement with the divestiture --

Q. I'm not talking about that though. I'm talking about a definitive merger agreement is signed but there is no divestiture accomplished before the closing.

A. I'm sorry. You're talking about the definitive merger agreement as the hallmark for this event.

Q. Yes.

A. That helps. I've been involved in cases where a definitive

merger agreement is signed. There's an understanding that divestitures may be required; not clear whether they will or won't, but they may be required, but there is no divestiture buyer identified at that point, yes.
Q. So it is not an inherent requirement of a proposal to buy another company where a divestiture is going to be or potentially be necessary that a divestiture candidate be legally committed at the time the merger is agreed to, is it?
A. In the abstract of any potential transaction?
Q. Yes.
A. Lots of different structures happen, and that one isn't always happening. So, from that perspective, I wouldn't view it as inherently required.
Q. When the board of a target is deciding whether an offer that is made to it is superior to a contract that it already has, one of the things it has to consider is whether or not antitrust approval is likely to be obtained or is reasonably capable of being obtained, right?
A. I've never been on a board, but just in my experience and understanding, the things that boards think about and one of the things that boards seek advice from antitrust lawyers about is what is the antitrust risk of this transaction relative to this other alternative. My understanding is the board takes that advice into account when weighing both of those options.
Q. What the board has to determine when considering an

alternative proposal is whether it's comfortable with the antitrust solution that's being proposed by the offerer. Isn't that right?
A. One of the factors that boards take into account I believe is the antitrust risk of any particular offer that's on the table.
MR. WEINBERGER: I have no further questions, your Honor.
THE COURT: Any redirect?
MR. WILSON: Yes, your Honor. I have a few questions.
REDIRECT EXAMINATION
BY MR. WILSON:
Q. Mr. John, at any time while you were representing Guidant on behalf of Skadden, did you have any reason to suspect that Guidant was acting inconsistent with its obligations under the J&J/Guidant merger agreement?
A. No.
THE COURT: Well, was that even an inquiry that you were making?
THE WITNESS: I remember having a discussion with Brian Duwe shortly after Boston made its offer for the company and Brian pointed out Guidant's obligations under the non-solicitation provision of the merger agreement, and that we needed to make sure that the antitrust team was coordinating with the corporate team to make sure that Guidant adhered by

its obligations under the J&J/Guidant merger agreement. So from that perspective, I guess I made an inquiry. I don't remember who initiated the conversation, but the fact that that obligation existed was something I was aware of.

THE COURT: But did you ever view any of the considerations you were making through the prism of the J&J merger agreement?

Let me rephrase that. Did you ever stop to consider although I'm comfortable with this from an antitrust perspective, I should now consider whether this is permissible under the J&J merger agreement?

THE WITNESS: No, I was relying on my corporate colleagues to make those considerations.

THE COURT: OK. Go ahead.

BY MR. WILSON:

Q. Some of that was just covered in your answer to the Judge, but how did you ensure that your actions as antitrust counsel to Guidant didn't violate any obligations to Johnson & Johnson under the Guidant/Johnson & Johnson merger agreement?

A. Well, again, going back to the conversation with Brian, I'm sure we would have coordinated anyway, but it did highlight the need to make sure we were in close coordination; the antitrust team, that is, with the corporate team, where the antitrust team would be looking out for the Guidant antitrust obligations. and in coordinating with the corporate team I was expecting the corporate team would be monitoring the obligations that Guidant may have to J&J under the merger agreement.

Q. Do you recall taking any actions in relation to the antitrust concerns that you worked on for Guidant that were not run by the corporate team?

A. No, I don't recall every single interaction with the corporate team and when they all took place, but I don't sit here today and remember I'm going to do this and I'm not going to wait for the corporate team or I'm not going to talk to the corporate team before I did it.

Q. You were asked some questions about the addendum to the Boston Scientific Guidant confidentiality agreement?

A. Yes.

Q. As an initial matter, what was the motivation of the addendum to the Boston Scientific Guidant confidentiality agreement?

A. My understanding the motivation was Boston was seeking certain information in due diligence that was competitively sensitive Guidant information in areas of Guidant's business where it competed with Boston at the time or it was a potential competitor of Boston at the time, and the Boston Scientific/Guidant confidentiality agreement didn't have the layers of protection that we in the antitrust team felt were advisable for Guidant to have before it exchanged that information.

The purpose of the addendum was to set forth the metes and bounds of how that competitively sensitive information would be exchanged such that the exchange was done in a way consistent with Guidant's obligations under the antitrust laws.

THE COURT: You're talking it had nothing to at all to do with Johnson & Johnson merger agreement; it was an exclusively antitrust document?

THE WITNESS: My perspective on the document was antitrust focused. The corporate team was also involved in negotiating the document. I don't know if they had other things in mind when they were negotiating.

THE COURT: Did you have an understanding, in addition to antitrust considerations, there were also considerations as to whether or not the sharing of due diligence was in compliance with the J&J merger agreement?

THE WITNESS: I believed at the time that the corporate team was taking those obligations into account. Whether or not it was wrapped into the addendum, I don't know.

THE COURT: Go ahead.

Q. When you first took the stand, I gave you a copy of your affidavit that was bound with exhibits. If you could take a look, please, at tab 11 to that document which is --

(Pause)

Q. This is a document that was previously marked as Stoll 14.

It is hard to read down the bottom, but take a look at this document and tell me if this reflects the motivation of Skadden as you understood it in proposing the revisions to the addendum to the Boston Scientific/Guidant confidentiality agreement that were proposed?

A. Yes, I think it does reflect the motivation for some of the changes. I think there were other changes that were made that weren't discussed in here, but yes.

Q. Fair enough. I want the record to be clear about that. I'm talking about the change in the agreement to allow Guidant to disclose the existence or identity of a divestiture buyer to its representatives, or as required by preexisting agreement or law, that section of the agreement. And my question is, were those changes that were made to the agreement by Skadden motivated by antitrust concerns?

A. In part, yes, as reflected by this exchange here with Linda and Neal. When I say in part, the antitrust team's comments in making those suggestions were motivated from an antitrust perspective, yes.

Q. Were you aware of any corporate contribution to the edits that were made to that document in adding the language that would allow Guidant to disclose the identity or existence of a third party divestiture candidate?

A. I'm sorry, no.

Q. So the reasons, as you recall them -- if you could take a look at Stoll 14, are these the reasons that you recall Neal Stoll suggests that we would have to tell our advisors and potential consultants; and Linda Cennedalla raises the issue of needing to contact Boston Scientific if we redid these terms would we tell the FTC?

A. Yes, that's right.

Q. You were shown earlier, and this is in the binder of materials that Mr. Weinberger gave you, a document marked as John Exhibit 20. Could you take that out, please?

If you could turn to the second page of that document, the language I want to direct your attention to is your statement that "Apple called having this access critical and said if they were not given this access, they would walk from the deal, but then they said that about a lot of things."

A. I see that, yeah.

Q. Can you explain what you meant in this comment?

A. That Abbott had suggested that if they didn't get access to the information, that they would cease participation and discussions and totally walk away, but my parenthetical suggests that I viewed that with some skepticism; just their course of dealing during this time frame was one of absolutes that weren't necessarily consistent with their behavior.

Q. You were also shown -- these are in the binder that Mr. Weinberger gave you -- John Exhibit 30. If you could turn to that. And then also Stoll Exhibit 27. If you could take a

look at those two documents. Let's start with John Exhibit 30. You see this is a letter to Cravath dated December 22, 2005?
A. Yes.
Q. And you see that the language in the first paragraph reads "Enclosed please find additional diligence materials for Guidant Corporation. These materials have been provided to Boston Scientific or their advisors in connection with their diligence review"?
A. I see that, yeah.
Q. OK. And if you now will turn to Stoll 27?
A. OK.
Q. You see a reference under number 2 there, also 12/22/05, Boston Scientific DES due diligence materials part two?
A. Yes, I see that.
Q. You see that? Do you know whether those materials went to Boston Scientific or went to Abbott?
A. I don't know one way or the other whether they went for sure. As with the discussion earlier in connection with the December 30 letter that these documents suggest that the materials were provided to Boston Scientific, and I have no reason to believe they weren't.
Q. Do you know the origin of this letter, of the letter itself, the form "Enclosed please find additional diligence materials for Guidant. These materials have been provided to Boston Scientific or their advisors in connection with their

diligence review"?
A. It looks familiar to a letter that I think the antitrust team and the corporate team worked on at the beginning of the process of potentially sharing Guidant information with either Boston Scientific or Abbott that would be communicated to Johnson & Johnson.

From my perspective of the paragraph, it is more familiar to me than the initial paragraph. It puts the second paragraph into -- the second and third paragraph, but especially the second paragraph, relating to Guidant's expectation that the provided to Johnson & Johnson would be treated by Johnson & Johnson appropriately and not exchanged within Johnson & Johnson with individuals at Johnson & Johnson who should not view the material from an antitrust perspective.

THE COURT: I have a question. So the first paragraph of John 30 talks about materials provided to Boston Scientific or their advisors in connection with their diligence review. You're saying there was a form document that referred to due diligence materials being provided to Boston Scientific or to Abbott?

THE WITNESS: No. What I was talking about is this letter, I think when it was originally put together, there was a draft that was worked on between the antitrust team and the corporate team, and, you know, at this time I'm not sure if we were aware of Abbott at this time, but I don't think we provided information to them at this time. But I recall working on this letter before the December 22 date at a time when we were aware of Abbott and the language was -- the expectation at the time the letter was initially drafted was that due diligence would be provided to Boston Scientific or other --

THE COURT: You just Abbott is what you said a minute ago. Didn't you say that?

THE WITNESS: I said Abbott. I think when we were talking earlier on direct, it turned out the same form letter was used. It appears the same form letter was used to communicate material had been shared with Abbott.

THE COURT: You said "it looks familiar to a letter that I think the antitrust team and the corporate team worked on at the beginning of the process of potentially sharing Guidant information with either Boston Scientific or Abbott that would be communicated to Johnson & Johnson."

Do you remember saying that?

THE WITNESS: I misspoke.

THE COURT: So was there ever a version or a draft that said Abbott in a draft letter that was designed for Cravath or Johnson & Johnson?

THE WITNESS: I don't recall.

THE COURT: Would you ever expect that Abbott would be identified in a letter of this sort by name?

THE WITNESS: I don't recall.

THE COURT: At the time the draft of these letters went out because you remember participating in the drafting of the template. Is that a fair statement?

THE WITNESS: Correct.

THE COURT: So at the time you were preparing the template, were you aware that Abbott was a divestiture partner, a likely divestiture partner.

THE WITNESS: I'm sorry, your Honor. No, I don't believe so.

THE COURT: At some point did you come to the view that Abbott was an advisor to Boston Scientific?

THE WITNESS: No.

THE COURT: No. Now, did you see the December 22 letter before it went out?

THE WITNESS: I don't recall.

THE COURT: And the January 30 letter that was also referenced. I'm not sure what number that is.

THE WITNESS: I'm guessing I would have seen it, but I don't recall sitting here today whether I did or I didn't.

THE COURT: Go ahead.

BY MR. WILSON:

Q. Your Honor, I have a document that I think of will clear up some of this. It has not been marked as an Exhibit previously. Mark it as Defendant's Exhibit 223. It has the Bates number

SA00158136 for identification.
THE COURT: OK.
Q. Now, you just testified that you recalled, Mr. John, that the form cover letter was prepared to your recollection before Abbott's identity was known to Skadden, correct?
A. That's right.
Q. Take a minute, it is a little bit of a long document, but if you start to the back, the back is an attachment to the letter. We will get to that in just a second. You can go back a couple of pages where you have an email. It's an email from Mr. McConnell to Mr. Kury. Do you see that at the back?
A. Yes, I do, I see it.
Q. And it is concerning what I can characterize as a detailed antitrust issue. I don't think we need to dwell on --
A. Yeah, just my brief looking at this, it looked like Mr. McConnell was highlighting areas in which Boston Scientific and Guidant competed with each other. And there's also areas in which Boston Scientific was interested in getting due diligence, and those two things together would have raised to an antitrust issue.
Q. If you look at the email that is at the top of the page marked with Bates number ending 138, you will see an email from Mr. McConnell to Mr. McCoy copying Bernie Kury. Do you see that?
A. I see it, yes.

Q. It says, "This all makes sense to me. Tyler, can you please coordinate with Skadden and Bean, outside counsel, to provide the suggested information. Bill." Do you see that?
A. I do.
Q. Then if you following forward in the chain, that is forwarded to information is sent to Alison Rhoten and then on to you, Linda Cennedalla and Neal Stoll. Do you see that?
A. Yes, I do.
Q. You then write an email with the date Thursday, December 15, 2005, and the time stamp reads 7:33:
"Two things. (1) With regard to Monday, I assume you're thinking about how and when to provide to Juice what gets shared with Bean?" Do you see that?
A. Yes, I see that.
Q. So you were aware at this time that Guidant was under an obligation to share materials exchanged in the due diligence process with Boston Scientific to Johnson & Johnson. Correct?
A. Yes.
Q. Alison Rhoten then writes back to you in the email above with the date Thursday, December 15, 2005 and a time stamp 8:38 p.m. "The Guidant folks should be well aware that if they provide new info to Bean, it must also be provided to Juice. Linda can collect copies of this material and Fed Ex it from California to the appropriate person at Juice. We sent her a suggested cover letter today. Who is the proper recipient of

these materials at Juice? Outside counsel? Do you see that?
A. I do, yeah.

(Continued on next page)

Q. And then going to your e-mail, which is on the bottom of the first page, carrying over to the top of the second page of this document. Your e-mail is also dated December 15th at 8:34 p.m. You say, "Yes, sending Juice a copy of the pages being used from certain documents sufficient perhaps along with each document's title page. I would suggest the cover letter for the material be sent from Skadden corporate counsel to Cravath. Although, Linda can certainly physically prepare the package." Do you see that?
A. I do, yes.
Q. And then on the front page of this document you suggest on Friday, December 16th -- well, let's just say the document says Friday, December 16th, 2005, 8:40 p.m. it says --
THE COURT: 8:40 a.m.?
MR. WILSON: Yes, I'm sorry.
Q. "When sending it to Cravath, we should include language that Cravath may not share the documents with anyone at Juice directly involved in the ... and pick up language from the addendum." Do you see that?
A. Yes, I do.
Q. And then you see that two associates at Skadden exchange e-mails concerning the drafting of that cover letter?
A. Yes, I see that.
Q. And that's Melissa Braswell and Alison Rhoten?
A. Correct.

Q. And who were they again?
A. At the time, I recall them being in the corporate group in Skadden Chicago office.
Q. Okay. And do you know how senior they were?
A. I believe they were associates. I don't remember how long they had been out of law school.
Q. Okay. And take a look at the attachment. This is the last two pages of this document. Do you see it? The first paragraph reads, "Enclosed please find additional diligence materials for Guidant Corporation." These materials had been provided to Boston Scientific or their advisers in connection with their diligence review?
A. Yes, I see that.
Q. Do you see that?
A. Mmm, hmm.
Q. To the best of your knowledge, is this the origin of the cover letter language referencing Boston Scientific or its advisers?
A. Yeah, I believe so.
Q. If you could take a --
THE COURT: This is before the accession agreement that refers to Abbott as retained by Boston Scientific to advise it, correct?
THE WITNESS: Before the accession agreement that the parties ultimately signed. The form accession agreement, I

think, was around at this time because the form was around for, you know, well before the whole transaction ever started. But, yes, before the accession agreement that Boston and Abbott and Guidant signed that had this language in it, yes, this predated that.

THE COURT: And this is before Mr. Stoll said that one of the ground rules was that any of the third-party divestiture agreement was going to have to sign that accession agreement, right?

THE WITNESS: I can't remember the date of Mr. Stoll's e-mail. I think it came after this. I don't remember. Sorry.

BY MR. WILSON:

Q. If you could look in your direct affidavit binder with exhibits, please, at Tab 24?

THE COURT: This is this one?

MR. WILSON: Yes. Yes, your Honor.

Q. You'll recall while Mr. Weinberger was asking you questions, he showed you a variety of drafts of the accession agreement that were sent from Laura Gunther at Abbott to you during the course of one day?

A. Yes.

Q. I believe those were marked as John Exhibit 10, 11 and 12?

A. Yes, I remember those.

Q. Did there come a time during that day when you suggested an alternative means by which Abbott could be appropriately bound,

from an antitrust perspective, to the restrictions on the flow of information that you felt were necessary from an antitrust perspective, other than the access agreement?
A. I remember proposing an alternative method to protect Guidant's interests in adhering to its obligations under the antitrust laws, and that would have been Guidant sending a letter to Abbott along the lines of, we're sharing with you this information under these circumstances with an understanding we have from you that you will treat it in X, Y, Z way and that that letter would not require a counter-signature by Abbott. It would simply set forth the understanding that Guidant had and that Guidant was relying on that understanding in providing the material.
Q. And that understanding and that alternative method was presented here in what we've marked previously as Defendant's Exhibit 60, correct?
A. Correct.
Q. So as an alternative to waiting for their markup of the accession agreement, you could instead send them a letter along the lines of the attached, and then let them have accession to the data room using your own judgment of who to send it to?
A. From an antitrust perspective, it would have worked. In my e-mail to Bernie, I said a signed agreement would provide greater antitrust protection and have somewhat lower business risk, but this sending a letter is an acceptable option, from

an antitrust perspective, and one that clients of mine have used in the past.

Q. And looking at that letter, would you take a look at it if you don't mind. It's the last two pages of DX60. This document does not characterize Abbott as an adviser to Boston Scientific, does it?

A. No, it does not.

THE COURT: Because there's no antitrust reason to do so, right?

THE WITNESS: Because Abbott was interested -- a potential buyer of assets, and that provided a legitimate purpose for access to Guidant sensitive information. That provided an antitrust reason for the exchange, which would have been sufficient. No additional reason would have been necessary.

THE COURT: All right. There's no need to force Abbott under the header of adviser for antitrust purposes, right?

THE WITNESS: That's correct.

THE COURT: There might be for some other purposes, but you weren't focused on the J&J merger agreement, right?

THE WITNESS: I was relying on my corporate colleagues to focus on the elements of the J&J merger agreement that related to Guidant's obligations to Johnson & Johnson under that agreement.

THE COURT: All right.

BY MR. WILSON:

Q. You were negotiating the accession agreement with Boston Scientific -- All right, strike that.

You were a part of the antitrust team that was negotiating the terms of the accession agreement with Abbott, correct?

A. That's correct.

Q. Okay. And is it your understanding that there was any intent to compel Abbott or Boston Scientific to accept language that it was being retained as an adviser for purposes of evading any Guidant responsibilities under the Johnson & Johnson/Guidant merger agreement?

A. I don't have any recollection of anything like that.

Q. Okay. And do you think that you would, if you had been aware of it at that time?

A. I would think so.

THE COURT: Do you have any idea what kind of conversations Mr. Stoll was having with Mr. Mulaney or Mr. Duwe?

THE WITNESS: Obviously, I can't speak to the conversations that took place that I wasn't aware of. Neal and I worked pretty closely together, however, and if there was something that Neal felt it was important for me to be aware of, he would generally have made me aware.

I can't say that he talked to me about everything, but he was pretty good about keeping me informed about conversations that would have related to the various things that were happening during this time period.

BY MR. WILSON:

Q. And did you have any understanding that Neal Stoll was in communications with the corporate group regarding some effort to avoid complying with responsibilities to Johnson & Johnson under the Johnson & Johnson/Guidant merger agreement?

A. No, I have no awareness of that.

Q. You were asked questions about the voluntary provision of documents to the FTC?

A. Yes.

Q. Okay. And did you make the corporate group aware of your provision of those documents to the FTC before you provided them?

A. I believe I made the corporate group aware of the requests and the advice to the client to respond to the requests. I don't know if I reached out to them again and said, oh, by the way, we're actually sending these materials. I certainly would have told them we received the request from the FTC, and we were advising the client to respond, and we expected that we would respond.

Q. From your perspective, not only did you keep the corporate group in the loop on the provision of documents to the FTC, but

you communicated or had communicated to Johnson & Johnson that these documents were going to the FTC, right?
A. I believe so.
MR. WILSON: Okay. I've got a couple of documents. I'll do them quickly, if I can, your Honor. I don't want to take up too much time with this. I'll mark them as 224, Defendant's Exhibit 224.
THE COURT: They're not in the binder right?
MR. WILSON: Pardon?
THE COURT: These are loose; they're not in the binder?
MR. WILSON: That's right. They're loose. I'll bring them up in just a moment, sir.
THE COURT: 224?
MR. WILSON: 224 and 225.
BY MR. WILSON:
Q. For identification purposes, I've marked as DX224 a document bearing the Bates No. number SA00087481, and as Defense Exhibit 225, document bearing Bates No. SA00097045.
If you can just take a moment to look at those documents for me, Mr. John.
A. Okay.
Q. Okay? And I don't know if you need your recollection refreshed or not, but in any case, do you recall now that you were fully agreeable to the idea of Johnson & Johnson being

informed that documents were being shared with the FTC as a part of Guidant's evaluation of the Boston Scientific/Abbott proposal for the company at this time?
A. Yeah, that's correct.
Q. One other question regarding joint defense agreements, and I'll sit down. You said that you believed it is correct that you had -- that Guidant had entered into an oral joint defense agreement with Boston Scientific at the beginning of its negotiations with Boston Scientific concerning antitrust issues?
A. Yes. Somewhere shortly after Boston made the offer, I recall generally an initial conversation we had with Boston Scientific's antitrust counsel that the topic came up, and I don't remember the specifics, but I have a vague recollection that there was an oral joint defense agreement at that point.
Q. And you also had a joint defense agreement with Johnson & Johnson as part of Johnson & Johnson's proposal to merge with Guidant, correct?
A. Yeah. Again, I don't recall the specifics, but I recall having the process being similar and having an oral agreement as part of our initial phone call. I think it was Weil Gotshal, Johnson & Johnson's antitrust advisers, that ultimately became a written joint defense agreement between Johnson & Johnson and Guidant.
Q. From an antitrust perspective, what is the purpose of

entering into a joint defense agreement?
A. Well, there are a couple of purposes. The ones that are most prominent in my mind are, one, in the joint defense agreement you can categorize information in different levels of sensitivity and detail exactly who would have access to that information.
Most importantly is information exchanged on an outside-counsel-only basis such that the lawyers for the parties receiving the information would have an obligation not to share that information with their client, which competitively sensitive information can be the primary purpose of that, and the other is to make clear that, to the extent that Boston -- that the parties, whether it's J&J and Guidant, Boston and Guidant, are discussing potential arguments, strategies of engaging with the FTC or other regulators in connection with a potential transaction and legal theories, that each of those two -- that each party to the agreement might have -- it might bring to bear in connection with that engagement that exchanging those legal theories doesn't -- to the extent they were privileged beforehand, doesn't destroy the privilege by virtue of the exchange.
Q. And the intent to maintain that privilege, to not have the privilege destroyed by sharing with counsel to another party, what is the purpose of preserving that privilege?
A. In my experience the purpose is so that the two parties can

discuss with each other freely the potential arguments and any antitrust risks associated with the transaction without fear that those -- that that thinking becomes non-privileged and, thus, disclosable to the agencies.

It's a way of, before you engage with, for example, the FTC, you want each party to talk to each other and get your thinking down as to how are we going to discuss this particular business area. What arguments are we going to bring to bear. And you often have ideas during that process you choose not to pursue, and you want not to disclose to the FTC, you know, your inner workings before you finalize your approach on how you're going to discuss a particular issue with them.

MR. WILSON: Thank you. I have no more questions for you at this time.

MR. WEINBERGER: I have a few, your Honor.

THE COURT: All right.

RECROSS EXAMINATION

BY MR. WEINBERGER:

Q. Isn't it correct that before Abbott sent you back the signed accession agreement, you had a conversation about it with Laurie Gunther?

A. I recall speaking with Laurie Gunther a few times about the accession agreement.

Q. Before she sent it back to you signed, isn't that right?

A. There were conversations that I had with Laurie Gunther about the accession agreement before it was signed, yes.

Q. And you don't remember any of them in which she objected to the language about being obtained as retained as a representative?

A. I remember the discussions with Laurie and other members at Abbott being relatively tense and that Abbott didn't want to have to sign any additional layers of confidentiality protection. They were resisting the whole notion of signing on to additional confidentiality protection and the notion that the due diligence would be delayed while that was being put into place.

Q. That wasn't my question. My question was, you don't recall any conversation in which she objected to the language that said Abbott has been retained in any of the phone calls that you had with her prior to Abbott sending you a signed accession agreement?

A. Other than the general context of her objecting to the whole process, no.

Q. You talked about the letters that went along with the diligence that was -- the letters that went to Cravath and J&J, you said they were the result of a form?

A. Yes, I think that's right.

Q. And the form said Boston Scientific and its advisers?

A. Correct.

Q. Could you look at John Exhibit 29 in the binder I gave you

this morning. Is that one of the forms, sir?
A. I don't remember being involved in putting this letter together.
Q. Is that one of the forms that you testified about?
THE COURT: Does it track the form that you were testifying about?
THE WITNESS: It doesn't appear to match the form that I remember using.
BY MR. WEINBERGER:
Q. In fact, this one says that the materials were provided to Boston Scientific, not to Boston Scientific and/or its advisers; is that correct?
A. Correct.
Q. And form or no form, you had already agreed that you couldn't tell Johnson & Johnson that materials had been provided to Abbott; isn't that correct? You already agreed to that in the addendum?
A. I don't know if we agreed to that, no.
Q. The addendum said you can't disclose the identity of any potential third-party divestiture candidates without the express consent of Boston Scientific and such candidate; isn't that right?
A. That sounds right.
Q. So if you had written a letter to Johnson & Johnson truthfully telling them that you had given DES materials to

Abbott, you would have violated that agreement, wouldn't you?
A. I suppose if we had used Abbott by name and we hadn't received Boston Scientific's permission, then yes.
Q. I'd like to ask you about the two -- Did you mark these numbers?
MR. WILSON: Yes, the shorter one is DX224, and the longer with one is DX225.
MR. WEINBERGER: All right. DX225, did you say?
MR. WILSON: 224 and 225.
BY MR. WEINBERGER:
Q. It's 225 --
A. The longer one?
Q. -- that I'd like to ask you about. In 225 you said, "Please let J&J know that we plan to provide these materials to the FTC most likely tomorrow in response to a specific request from the FTC." Do you know if Alison Rhoten told J&J that the provision of those materials was entirely voluntary?
A. I don't know.
Q. You said that everything you did you coordinated with the corporate folks at Skadden, pretty much everything you did, right?
A. I certainly would, that's my recollection, and I believe that would have been our intention.
Q. So when you signed the addendum, that was something you coordinated with them; is that right?

A. I don't remember if I signed the addendum. I don't remember. I thought it was the client who signed it.
Q. Okay. When you drafted the addendum and made the changes and put the provisions in there that ultimately wound up in there, that was something that was coordinated with the Skadden corporate group, right?
A. That's my recollection, yes.
Q. And when you gave the co-promote agreement, despite the confidentiality agreement in the co-promote agreement, that was coordinated with the corporate team?
A. I don't remember if we actually -- I mean, I know we talked about some documents where it looked like it was provided to them. I, sitting here today, can't tell you for sure that it was provided to them, but certainly providing any due diligence to either Abbott or Boston Scientific or Johnson & Johnson for that matter, going back, would have been coordinated with the corporate team.
Q. When you sent letters to Johnson & Johnson saying that information that had actually been given to Abbott had been sent to Boston Scientific and its advisers, was that coordinated with the Skadden corporate team?
A. I'm sorry, could you ask that question again.
Q. When you sent letters or when your group sent letters to Johnson & Johnson or Cravath telling them that information had actually been given to Abbott, was given to Boston Scientific

and its advisers, was that coordinated with Skadden's corporate team?
A. I don't know if the draft letter that was used there, which was the form that had been used in the past was sent to the corporate team before it was sent. I'm sure that the fact that the materials that had been shared with Abbott were being sent to Johnson & Johnson was discussed with the corporate team. I physically don't, sitting here today, remember whether the day before or the day of the letter being sent to Johnson & Johnson, whether that letter was provided to the corporate team.
Q. When you signed the accession agreement that said Abbott had been retained to represent Boston Scientific in connection with the proposed transaction, was that coordinated with the corporate team?
A. Again, I didn't sign the accession agreement. I don't think the client did, but I'm sure that we would have coordinated with the corporate team before advising the client that it was appropriate to enter into the accession agreement from an antitrust perspective.
MR. WEINBERGER: I have no further questions.
MR. WILSON: I have no further questions for the witness, your Honor.
THE COURT: Okay. I have a couple. You said you're generally familiar with the J&J merger agreement, right?

THE WITNESS: Correct.

THE COURT: Okay. So I'm going to refer you, just so you have it in front of you, to Kury 9, section 4.02. Do you see that there? So you understood that there was a provision in there that restricted what could be shared in the event of a potentially superior takeover proposal. Did you understand that?

THE WITNESS: I understood generally there was a restriction that limited Guidant's ability to provide information to third parties for the purposes of soliciting a takeover proposal.

THE COURT: Okay. And so you understood that the limits as to who could receive that kind of stuff was defined in section 4.02(A); did you understand that?

THE WITNESS: Generally. I don't remember thinking about it specifically at the time.

THE COURT: All right. And so if you take a look at 4.02(A) in front of you there, it's got a list of folks who were covered under the term representatives, with a capital R; do you see that?

THE WITNESS: I do, yup.

THE COURT: And among the litany of individuals or entities that are covered by representative, are financial advisers and accountants or other advisers; do you see that?

THE WITNESS: I do, yes.

THE COURT: So did you have an understanding at the time you were working on the accession agreement with Abbott and Boston Scientific, that the definition or that the term adviser carried some pretty significant weight in connection with 4.02 of the Johnson & Johnson merger agreement?

THE WITNESS: I don't remember thinking about that term in the accession agreement as it related to 4.02 at the time.

THE COURT: Okay. So if you look at what's been marked in your binder, I can give it to you, as Knopf 35. I'll just hand it to you. Okay? What I have highlighted there is the accession agreement, right?

THE WITNESS: Yes.

THE COURT: Here's the rest of it, if you want to see the signed version.

THE WITNESS: Mmm, hmm.

THE COURT: And the first line says -- maybe I need it back.

THE WITNESS: It's okay.

THE COURT: It says, the first line of the second paragraph says, "Abbott Laboratories, Abbott, has been retained by Boston Scientific to advise it in connection with a potential transaction." We've been over this a bunch of times, but you see that, right?

THE WITNESS: I see it, yes.

THE COURT: Okay.

THE WITNESS: I have it here.

THE COURT: And so if that is taken as true, then Abbott would be an adviser under 4.02(A) of the J&J merger agreement, correct?

THE WITNESS: I don't really remember thinking about it at the time; so I'm not sure I'm the best person to ask that one.

THE COURT: Well, as you sit here now, under oath, sipping the water that I've poured for you, do you think Abbott was retained by Boston Scientific to advise it in connection with the potential transaction?

THE WITNESS: I don't think that's the best description of their relationship.

THE COURT: I didn't ask whether it was the best description. I asked whether you think it is a truthful statement.

THE WITNESS: I think it's unlikely. I don't know that it's not truthful, but I do think it's unlikely.

THE COURT: Well, based on what you understand of the relationship between the parties, recognizing there may be some things you don't understand, but based on what you do understand, do you think that's an accurate statement?

THE WITNESS: I think it's unlikely to be accurate.

THE COURT: All right. Anything else, counsel?

MR. WEINBERGER: No, your Honor.

MR. WILSON: No, your Honor.

THE COURT: No? Okay. Thanks. You can leave everything here. You can take the water, if you like. Thanks very much.

(Witness excused)

THE COURT: Okay. Our next witness is?

MR. OHLEMEYER: Professor Cornell.

MR. COFFEY: Your Honor, I just want to, in case your Honor is interested, we do have the sovereignty to reopen our case with regard to Mr. Stoll. I don't know --

THE COURT: Let's try to get the live witness on and off. Do we think we'll finish this witness today?

MR. OHLEMEYER: Yes, absolutely.

THE COURT: Mr. Ohlemeyer is shaking his head. We'll take an afternoon break around 3:30, 3:45 or so. So when we get to that time, Mr. Ohlemeyer, then you'll let me know when you're at a breaking point. Okay?

MR. COFFEY: It's probably going to be --

THE COURT: I'm sorry, right. It's your witness. You're just introducing the affidavit. Okay. So, Mr. Coffey, you'll let me know. And then maybe let's clear out everything that is not pertaining to the next witness that's up at the witness box.

MR. WILSON: Sure. I'll get it.

THE COURT: Okay. Are we ready?

MR. OHLEMEYER: I believe the witness is walking through the door as we speak.

THE COURT: Maybe you want a drumroll.

BRADFORD CORNELL,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

THE COURT: Once you get comfortable, if you could just then state your name and spell your name for the record.

THE WITNESS: It's Bradford Cornell, B-r-a-d-f-o-r-d, C-o-r-n-e-l-l.

THE COURT: Okay. And do you prefer Professor, Doctor, Mr.?

THE WITNESS: I don't like Doctor, because I have hypochondria. Professor or Mr. is fine.

THE COURT: Okay. Anybody have a preference? Professor, we'll call you Professor. I think you've earned that.

THE WITNESS: Good. Thank you.

THE COURT: So let's proceed. Go ahead.

DIRECT EXAMINATION

BY MR. OHLEMEYER:

Q. Professor Cornell, let me hand you what we've marked for identification as Defendant's 164.

THE COURT: Okay, thanks.

Q. Let me ask you if you recognize that?
A. I do. This looks like a copy of my trial affidavit.
Q. And you prepared and signed that earlier this year?
A. Yes.
Q. Have you had a chance to review it since you've signed it?
A. Yes.
Q. Are there any changes that need to be made to make it accurate?
A. No, no changes.

MR. OHLEMEYER: I move to admit Defendant's 164, your Honor.

THE COURT: Okay. 164 is received.

(Defendant's Exhibit 164 received in evidence).

THE COURT: With that, we'll --

MR. OHLEMEYER: Pass the witness.

THE COURT: Exactly. Okay.

CROSS-EXAMINATION

BY MR. COFFEY:

Q. Good afternoon, Professor Cornell. My name is Shawn Coffey. I'm an attorney at Kramer Levin, which represents Johnson & Johnson in this litigation. You and I have not met before; is that right?
A. That's right.
Q. You were retained by Guidant, on behalf of Guidant to respond to the report of Professor Gregg Jarrell; is that

right?
A. Yes.
Q. So I want to begin with the first opinion that you give -- if we can call that up, please, Marco -- paragraph 18 of your affidavit, which is that Professor Jarrell wrongly assumes that, but for Guidant's alleged breach, J&J would have successfully acquired Guidant at $63.08 per share. Do you see that?
A. I do.
Q. And I may just reduce that to $63 a share for the balance of the examination, but when I do that, you'll understand I'm referring to $63.08?
A. I'd do the same thing myself.
Q. We're already reaching common ground. That's great.
Now, that opinion is based, in part, on what you referred to as the fact that on December 5, 2005, Boston Scientific made an unsolicited bid to Guidant at $72 a share; is that right?
A. It is. That's correct.
Q. And you don't know if -- Withdrawn.
You cite to a December 5, 2005, letter from Boston Scientific's chairman, Pete Nicholas, to Guidant's board of directors, which can be found behind Tab 1 of a binder I'm about to hand you. I think everyone but you recognizes that as a shorter binder than what we've had previously.

THE COURT: Oh, yes. You're lucky.
Q. So Tab 1, Best Exhibit 12, and if we can flip to the last -- to Page 4 internally, Bates No. 4823. I just want to draw your attention to one of the things that Mr. Nicholas said in this letter. And do you see there that he said that the letter of December 5 was not intended to create or constitute any legally binding obligation, liability or commitment by us regarding the proposed transaction? Do you see that?
A. Yes.
Q. So this was a non-binding indication of interest; isn't that right?
A. That's my understanding, yes.
Q. It was not an offer; is that right?
A. Well, you're really asking me a legal question. To an economist, it's an offer, but it's, I guess, not a legally binding offer, if that's what you mean.
Q. Well, let's explore that. In the world of economics, is an offer something that needs to be acceptable? An offer is made and, therefore, is available for the offeree to accept?
A. Well, you can define it that way, but like I said, the concept is more one of law than economics.
THE COURT: You're not laboring under the misimpression that this was a legally binding offer, a formal offer that was the subject of a merger agreement, right?
THE WITNESS: No, I'm not.

THE COURT: You understand what it was?
THE WITNESS: Yes.
THE COURT: Okay.
BY MR. COFFEY:
Q. Right. And just to confirm that, your understanding was that the December 5 letter was not intended to give rise to any legally binding obligation on the part of Boston Scientific, right?
A. That was my understanding.
Q. Right. And the letter -- if we go further up on that page, the letter also says that Boston's tentative proposal of December 5, 2005, is subject to completion of confirmatory due diligence; do you see that?
A. I do.
Q. So as a result that, Boston did not have to make a definitive offer if, after doing its due diligence, it determined that it did not want to proceed, correct?
A. That's the way I understand it.
Q. Or if, for some other reason, Boston decided it wouldn't proceed, it was entitled to walk away without ever making a definitive offer, correct?
A. I think it legally had that option, yes.
Q. For example, if the Boston Scientific board decided that it did not want to proceed with a firm offer because some condition that it felt was important had not been met, it could

decide not to authorize a firm offer, correct?
A. Again, I'm not an attorney, but that is my understanding.
THE COURT: Well, any reason, or no reason, really, right?
THE WITNESS: Yeah, they basically said we think it's worth $72, that's what we're offering now, but it's not a firm offer that you can take. It's really our initial expression of interest. We have to do confirmatory due diligence.
BY MR. COFFEY:
Q. Now, the Boston Scientific December 5 letter wasn't a bid, was it?
A. Well, again, this depends on how you define a bid. The Thompson database picks it up and calls it a bid, but that's purely discretionary in what a bid is defined to be.
Q. It wasn't a bid that could be accepted by Guidant at that time, given the two points of the letter I've already pointed out, right?
A. Correct.
Q. Now, in your trial affidavit you do not consider what would have happened if, after making its non-binding proposal on December 5, Boston Scientific decided that it would not make a definitive offer and Guidant's board of directors recommended shareholder approval of Johnson & Johnson's offer; is that right?
A. I don't offer a specific scenario in that respect, no,

that's correct.
Q. And you're not offering the opinion that if Boston Scientific's December 5 proposal did not lead to a definitive offer, Guidant shareholders would have rejected J&J's offer, are you?
A. I have not, to this point, offered that opinion.
THE COURT: Not to this point, meaning not to this point in time or not to this point in your declaration?
THE WITNESS: No, I haven't offered that opinion. Maybe that's clearer.
BY MR. COFFEY:
Q. Well, let me be clear. If any of my questions suggest I'm focusing on anything other than what you put in your trial affidavit or in the report you submitted previously in this litigation, please ask me to clarify because that's what I'm focused on, is what you put in writing in this litigation.
A. Neither of those are in writing in this litigation.
THE COURT: But just so I understand, so December 5th, an offer, non-binding to be sure, of $72 per share is made. For some reason, as part of this hypothetical, a formal offer is never made. Do you have a view as to whether or not the $63-a-share offer that was part of the Johnson & Johnson merger agreement would have been approved by shareholders?
THE WITNESS: Well, I think -- that's why I was dancing around the answer, your Honor, because what do you mean

by "never"? Because the shareholders at the time that Boston Scientific was so-called walking away, they wouldn't know they were never going to make an offer. They may say they haven't made one today, but who's to say they wouldn't come back in a week or two?

So how would the shareholders credibly know that Boston Scientific was going away forever, particularly if they valued the assets of Guidant at $72? It makes no sense for them to go away forever. They reached an impediment. They would have to get around it, but they wouldn't have to go away forever. I wouldn't believe that if I were a shareholder that they were gone forever.

THE COURT: All right. Go ahead.

BY MR. COFFEY:

Q. Let me play off of that. So Boston Scientific under the scenario, doesn't come back for, you said, ever, but let me just say six months. And what the market knows is as of December 5, there is a condition that -- well, what it knows is that Boston has indicated it's interested. It put a number out there. It's got investment advisers -- pardon me, financial advisers. It's got firm commitments from some banks, but it says our proposal is subject to completion of confirmatory diligence.

Now, if an offer isn't coming -- forthcoming in the next weeks or months, isn't it reasonable for the market to take away that Boston isn't going forward because it came up with some issues that it didn't like in the course of its confirmatory due diligence? Isn't that a reasonable assumption?

A. I think the reasonable assumption is that the answer is not binary. With every day that passes, it would become less likely that they were going to come forward with a binding offer. So on December 6th, the fact that they didn't come up with one the next day wouldn't effect me very much if I were a shareholder.

THE COURT: How about if on January 6th they came forward with a statement that said we've done the due diligence and we've decided not to go forward with this bid, thanks very much?

THE WITNESS: That's pretty strong. I mean, it doesn't prove forever, but that's pretty close to it.

THE COURT: In the hypothetical, are you in a position to form an opinion as to whether or not the Johnson $63 a share would have gone forward?

THE WITNESS: Okay. Let's take that hypothetical.

THE COURT: Okay.

THE WITNESS: Under that hypothetical, I still think there's a significant chance that the offer would not have gone forward because you've now had a sophisticated party out there bidding 72. Many shareholders have been upset with the drop from 76 to 63, and given this added piece of the puzzle, I think there's certainly a possibility that many would have held out for a higher price.

THE COURT: All right. So I may have opened the door to something you didn't want me to open, but that's the beauty of being a fact finder.

MR. COFFEY: You saw me trying to cabin this. I should have been a little bit more explicit, but that's all right.

THE COURT: It's hard to object to a judge's questions in a bench trial. I'm not sure that you can, but it's hard to do that. But, look, I ask questions that I think are interesting and might be relevant to my role, my unique role in a bench trial. So I'm sorry if I made your lives more difficult.

MR. COFFEY: In my experience, it's even more difficult to object to a judge during a jury trial.

THE COURT: That's true, too. But I think the difference is I don't ask questions during a jury trial other than "could you restate" or I'm "not sure if I understood, could you rephrase." I don't do any more than that.

MR. COFFEY: So you're unleashing your inner examiner here?

THE COURT: Yes.

MR. COFFEY: Very good, Judge.

BY MR. COFFEY:
Q. Well, your opinion assumes that Boston Scientific was going to remain in pursuit of Guidant no matter what; is that fair?
A. No matter what? No, I don't think, with probability. My opinion assumes that you couldn't rule out that Boston Scientific was going to be a significant player.
Q. And that's based on the documents and deposition testimony that you cite in your expert report, that body of evidence?
A. Yes.
Q. Your opinion also assumes that Boston Scientific would have found a way to make a definitive offer without there being a breach of the merger agreement, right?
A. I thought they would, yes.
Q. Now, your report makes no reference to any -- your report does not -- withdrawn. Neither your report nor your affidavit identify any party, other than Boston Scientific, that would have bid for Guidant at a price above $63 per share or at any price; isn't that right?
A. I have not identified any such party.
Q. Now, in formulating the opinion that's in your expert report and your affidavit, you did not read the deposition testimony of any Boston Scientific employees or former employees, right?
A. I don't recall specifically; so I can't say for sure under oath. I don't recall having read them, but I can't say for

certain at this point that I didn't.
Q. Well, at your deposition you said you didn't. Is there some basis to think you might have done it since your deposition?
A. No.
Q. So you just don't recall?
A. No, I don't think I've done it since my deposition.
Q. So that would mean that you did not read any of the deposition testimony of Larry Best, who was Boston Scientific's former chief financial officer, right?
A. I think it would mean that, yes.
Q. Now, have you been told anything about -- were you told anything about his testimony as you were drafting your expert report?
A. Not that I recall, no.
Q. Have you been told anything about his -- were you told anything about his testimony prior to the time you filed your trial affidavit?
A. Not that I recall, no.
Q. Are you aware, as you sit here today, that as has been played during this trial, that Mr. Best has given testimony that touches on the issue of whether Boston Scientific would pursue Guidant no matter what?
A. No, I'm not.
Q. All right. So I'm going to play for your benefit a very

brief video clip of that because I think you just established that your opinion is based on a body of evidence, and part of what I want to do today, Professor, is expand the body of evidence on which you're able to opine.

So, Marco, why don't we play this brief video clip of Lawrence Best.

(Video being played)

When you rendered your opinion in this case, Professor, were you not aware that Mr. Best had testified that Boston Scientific's board would not authorize the company to make a firm offer for Guidant without a sign-on-the-dotted-line divestiture partner, were you?

A. I was not aware of that.

Q. That was not provided to you or shared with you?

A. I had not seen it.

Q. Now, were you provided any -- you're aware that the divestiture party that Boston Scientific lined up was Abbott? You're aware of that?

A. I'm aware of that.

Q. At the time you formed your opinions, were you aware or made aware of any evidence suggesting that Abbott would walk away from this potential divestiture unless it was given access to confidential Guidant information?

A. I didn't have sufficient information to determine that one way or the other.

Q. So let's call up John Exhibit 20, please.
THE COURT: In the binder or no?
MR. COFFEY: It's in the binders, yes, sir. No, it's not.
THE COURT: I don't think it is.
MR. COFFEY: Okay.
THE COURT: So you'll flash it on the screen or you'll hand this to us?
MR. COFFEY: I'll do that.
BY MR. COFFEY:
Q. So I just want to orient you. I will ask if you've seen this before. I suspect you have not, but this is an e-mail in December of 2001 from a Skadden antitrust lawyer to the general counsel of Guidant, and I'd like to flip to a particular part of the e-mail. You're familiar with the concept that investment bankers and others involved with a corporate merger deal, they'll come up with code names, right?
A. Yes.
Q. And do you know that Apple is the code name for Abbott?
A. That seems like a very poor choice to me, but....
Q. It's not exactly the ultra secret --
A. I wondered what Apple was doing involved in this case, but okay now.
THE COURT: You think it's a poor choice because there's a very prominent company called Apple, is that what

you're saying?

THE WITNESS: That's what I'm saying.

BY MR. COFFEY:

Q. But they succeeded in fooling you, so maybe the choice wasn't so bad. All right. I'll represent to you that Apple is Abbott, and what I want to look at in particular are a couple of things that are being kicked around between Skadden and Guidant.

And this is reporting to the general counsel of Guidant that Apple -- excuse me, Abbott wants to see some intellectual property licensing agreements, and we're okay with this from an antitrust perspective, as long as certain people who might be involved in this type of business on the other side don't get it. And, of course, there are issues related to certain confidentiality provisions in those documents.

But the part I want to direct your attention to is Abbott called getting this access critical and said if they were not given this access, they would walk from the deal and then, "but then they've said that about a lot of things," right.

So in formulating your opinions, were you ever -- was it ever shared with you that the divestiture party that Boston Scientific was lining up said it would walk away from the deal if it wasn't given certain Guidant information? Was that shared with you?

A. That specific fact was not shared with me. It totally doesn't surprise me because I've seen things like that said many times, but I wasn't aware of this particular quote.
Q. Well, do you have any reason to -- do you have any basis to disbelieve the threat that's being reported from Skadden to Guidant that Abbott is threatening to walk away if they don't get certain confidential information? Do you have any reason to believe that's not an accurate threat?
A. I don't have any specific information in this case. It would just be my general scepticism of those statements.
Q. Are you aware of testimony by two lawyers associated with Boston Scientific in this deal, one in-house and one outside counsel, that Abbott did not want Guidant to disclose to Johnson & Johnson that Abbott was a potential purchaser of the assets to be divested?
A. I don't specifically recall that.
Q. Well, let me ask you a preliminary question. Are you aware, from your review of the record or any other source, that Abbott had, earlier in 2005, entered into a licensing agreement with J&J to take effect if and when Johnson & Johnson closed the acquisition of Guidant? Are you aware of that fact?
A. Not that I recall, no.
Q. Are you aware from your review of the record or any other source, that Abbott considered that licensing agreement to be of value, something like a bird in hand?

A. I don't know.
Q. All right. I'd like to again expand the body of evidence available for you to render your opinions by playing you very brief clips of depositions of these two individuals. So let's play Larry Knopf. This is an in-house lawyer at Boston Scientific.

(Video being played)

All right. And now a brief clip from the deposition of Clare O'Brien, who was a lawyer at Simpson Thacher -- pardon me, she's at Shearman and Sterling, and as a lawyer representing Boston Scientific in the deal.

(Video being played)

So you had not been made privy to the two clips or even the written -- corresponding written transcript of these clips prior to rendering your opinion?
A. That's right. I don't recall anything like either of those two clips.
Q. All right. And just to expand that, at the time you rendered your opinions, you were not aware of evidence that Abbott was reluctant to go forward if its participation might be revealed to Johnson & Johnson?
A. I don't specifically recall ever considering that.
Q. And you were not made aware of evidence that Abbott insisted on getting access to confidential Guidant information, or it would not participate as a divestiture partner?

A. I was aware that they wanted certain confidential information. I was not aware of their threat to walk away.
Q. And you were not aware that the Boston -- according to the CFO of Boston Scientific, they would not make a firm offer for Guidant unless they had a sign-on-the-dotted-line divestiture partner lined up first? You weren't aware of that either, right?
A. Correct, I was not.
Q. I want to turn now to some of the analysis in your trial affidavit about empirical evidence about whether Johnson & Johnson would have been able to close the deal at $63. So why don't we pull up -- you can look in your binder, but I'll be putting this up on the screen, paragraphs 20 and 21.
At paragraph 20 you cite to empirical research by Betton and Eckbo, which you say found that when a second bidder emerges in a takeover contest, the original bidder acquires the target only 17 percent of the time, and that, on average, the winning bid in a multiple-bid contest was 18 percent higher than the original bid. Do you see that?
A. I see the first part, but where's the 18 percent? I don't see the number 18.
Q. It's probably in Paragraph 21. I don't know if we have that.
THE COURT: Well, you have it in front of you.
Q. You have it there?

A. I can look at it here.
Q. Feel free to check.
A. Yes, I see both of those now.
Q. Right. But the -- but Betton and Eckbo presume in their studies, do they not, that there actually is a second bidder, right?
A. Yes, all of these -- the results I'm citing there are conditional on a second bid.
Q. Right. A second bidder, who makes a definitive offer that can be accepted by the offeree, right?
A. No, I think it's just a second bid as the database defines it.
THE COURT: And how did the database define it?
THE WITNESS: Well, the database is a little vague that way, but, for example, to be specific, Boston Scientific's December 1st -- December 5th bid is a bid per the Thompson database, and they say they include anything reported in the press as a bid or an offer or an indication of interest to buy.
THE COURT: But they don't break it down by announcements followed by definitive bids, as opposed to announcements followed by retractions or just fizzling?
THE WITNESS: No, they don't. They don't break it down that fine.
THE COURT: Okay.
BY MR. COFFEY:

Q. Right. Well, let's leave Thompson to the side for a moment. I'm interested in what you consider a bidder. Your understanding is that Betton and Eckbo was talking about instances in which a second bidder makes a firm offer?
A. By firm offer, one that can be accepted, that there's no diligence, outs and so forth.
Q. Right.
A. No, I don't think that's what they're saying. As I recall, it's not that strong.
Q. All right. Now, the analysis they did did not address the question of what happens when a party makes a non-binding indication of interest, and then decides not to make an offer; isn't that correct?
A. They don't break that out. It might have happened in their sample. They have a big sample, but they don't break that out.
THE COURT: And you haven't broken it out for them?
THE WITNESS: No, I haven't done any -- the Betton and Eckbo, I just read the paper. I didn't go back and reproduce their data or anything. There's nothing I know that's not in that paper.
BY MR. COFFEY:
Q. Well, let's start with what -- it's not the case that the Betton and Eckbo database is entirely instances where bids, broadly defined as to include proposals, were made and none of them became firm offers, right?

A. Correct. It's just -- it was a sample of all tendered-offer bids during a certain period of time of a certain size. I don't recall the exact criterion, but the paper spells out very clearly what their data is.
Q. And these statistics that you cite are based in part, perhaps even large part, on instances in which someone has made a firm offer, right?
A. Correct. Those statistics would include second bids that were firm offers, the way you define them.
MR. COFFEY: All right. I can go a little bit longer, Judge, or --
THE COURT: Yes.
BY MR. COFFEY:
Q. Okay. Let's turn to Paragraph 22 of your affidavit. I think this will actually come up because I think I got this right. You also refer in Paragraph 22 to the results of your own study, which you say found that following the emergence of the second bidder, the original bidder acquires the target only 35 percent of the time, and that when the original bidder is successful, the original bidder is required to increase its original offer by 19 percent on average; do you see that?
A. Yes.
Q. Now, you also say here that your research in Paragraph 22, your research indicates that there were no instances in which the initial bidder acquired the target at the initial bid

price, right?
A. Yes.
Q. So now, we have you and not the Thompson database to worry about?
A. Well, not exactly because I use the Thompson database.
Q. Ahh. So, again, we are unsure where in the data that you're analyzing we have situations where there's a tentative proposal that is followed by a firm offer or a tentative proposal that dies on the vine and there's no firm offer, right?
A. Well, my sample is small enough that you can go back and track each deal, you know, detail by detail. It's not as big as the Betton and Eckbo; so you might be able to answer some of those questions. And perhaps I have data that did, if you have a specific question.
Q. But if we were looking for a study that had only instances in which there were tentative proposals and none of the proposals were followed up with a firm offer, if that's the study we were looking for, that wouldn't be the study you did here, right? And that's referred to here?
A. No, mine is different from that.
Q. So it does not purely address the situation where there's a tentative proposal that is not followed up with a firm offer; isn't that right?
A. It does not purely address that, correct.

THE COURT: Are you aware of any instances of that among the ones that you considered?

THE WITNESS: Not that I can think of, no.

THE COURT: Okay.

MR. COFFEY: All right. Now would be an appropriate time, your Honor, or I'm happy to keep going if everyone wants to go.

THE COURT: We need to take an afternoon break. If you want to do --

MR. COFFEY: Well, I can probably get to the very point you raise before we take our break.

THE COURT: Sounds good enough. I'm feeling good. Are you feeling good?

THE WITNESS: Fine.

THE COURT: I meant the court reporter.

THE WITNESS: Oh, the witness is not --

THE COURT: You haven't even worked up a sweat.

THE WITNESS: Okay.

MR. COFFEY: I'm fine too, Judge, in case you're --

THE COURT: Well, that goes without saying, Mr. Coffey.

BY MR. COFFEY:

Q. Professor, in forming your analysis, you looked at a database and isolated deals between 2002 and 2006 that were at least $500 million in size and were change-of-control

transactions, and this gave you 577 deals. Do I have that right?
A. I think so. That sounds familiar, and it's described in the report, too, and in the affidavit.

(Continued on next page)

Q. Right.
A. And in the affidavit.
Q. Now, of these 577 deals, only 29 involved multiple bids. Isn't that right?
A. That's what I recall, yes.
Q. Which you then culled down to 18 bids by excluding those that had no temporal overlap in the bids or where the target was in bankruptcy. Isn't that right?
A. Yes.
Q. And so you reduced it down to -- you had all these filters and you got down to what you thought were 18 meaningful deals to analyze, right?
A. Yes.
Q. And then you took one of those 18 deals out, right?
A. Yes.
Q. The Reckson deal, right?
A. Correct.
Q. And that's an instance where the target company was Reckson Associates Realty Corporation where a potential second bidder came on the scene but did not make a firm offer, right?
A. I think so, I'm trying to remember if Mr. Icahn's second offer after Macklowe and Mack-Cali had backed out was firm or not. I don't specifically recall. He had a funky offer with preferred stock in there. I don't know if it was firm enough to be accepted.

Q. Well, do you recall in your expert report saying that you excluded it because the bid wasn't taken seriously?
A. Well, there was a whole sequence of reasons I excluded it. Some of them were in my report; some of them were discussed in my deposition.
Q. Just to be clear, of the 18 meaningful deals that you isolated, the one you excluded was the one in which there was a tentative proposal and no firm offer followed. Do I have that right?
A. I can't say for sure that a firm offer didn't follow. There was an offer that followed, and it's the firm part that I'm not sure of. I believe that that's correct though; that it was not firm.
Q. Now, all of the second bids in the 17 transactions that you used in the data set were situations where a second bidder made a definitive offer. Isn't that right?
THE COURT: Well, made an offer.
THE WITNESS: I don't think it is definitive.
THE COURT: Yes, I thought you said a moment ago you didn't distinguish between definitive offers and just announced interests.
THE WITNESS: Well, later I went back and checked but at the time I did the study, no, I don't recall distinguishing.
THE COURT: OK.
Q. You did not test what happens when a second party gives an

indication of interest but then never makes a definitive offer for the target. Is that right?
A. That's right.
Q. And your study does not say anything about the probability that an initial bidder will acquire a target at the contracted for price where a second party makes a non-binding indication of interest but never makes a definitive offer. Isn't that right?
A. I do not assess that probability in my report or trial affidavit.
Q. And neither do the Betton & Eckbo studies that you cite. Isn't that right?
A. I don't recall them ever offering an answer to that question.
Q. And you did no empirical research to determine how often shareholders reject a deal where management recommends approval, right?
A. I know that's quite rare, but I don't have any specific study.
Q. Quite rare that shareholders will reject a management proposal in a merger deal?
A. Yes.
Q. Just to follow that up, are you aware of any situation in which there's a bid that's a premium to market at the time it's made that has the recommendation of management in which the

shareholders have rejected that when the options are "take the bid or stay a stand alone company"?

A. Well, the options are never that binary because you always have the possibility that something else will happen, but with that caveat, I'm not specifically aware of an example where there's a premium bid that management and the board have said should be accepted and the shareholders have voted it down.

MR. COFFEY: Now would be an appropriate time, Judge.

THE COURT: See you in about ten minutes.

(Recess)

(In open court)

THE COURT: Mr. Coffey.

MR. COFFEY: Thank you, your Honor.

Q. Now, Professor, with regard to the Reckson transaction, which was removed from your sample, you did so because you concluded based on a conversation, with a professor whose name you couldn't remember at your deposition, that the bid wasn't taken seriously by shareholders. Do you remember sharing that with us at your deposition?

A. Generally, yes.

Q. You could have tested whether the Reckson shareholders took that bid seriously by performing an event study, correct? That's one way to determine whether shareholders take a bid seriously?

A. Possibly, yes.

Q. But you did not perform an event study on Reckson, right?
A. No.
Q. And I just want to confirm this: Reckson is the only one out of the 18 transactions that you initially selected where the second so-called bid was an indication of interest that did not ripen into a definitive offer. Isn't that right?
A. It's certainly right that it didn't ripen into a definitive offer. I couldn't say for sure that it was the only one.
Q. All right. Well, that particular question came up in your deposition. Do you remember that?
A. No.
Q. So you can either look at it or we'll put it on the screen for you. We'll call up page 75 of your deposition, and I will direct your attention to lines 5 through 16. I will read it aloud and you can read it along with me:
"Q. As you sit here today, it's" -- referring to Reckson -- "As you sit here today, it's the only one out of 18 you're aware of where the initial -- where the second bid as an initial was originally initial an indication of interest and never resulted in a definitive offer?
"A. I think that's the case, but I haven't, OK, specifically investigated that question."
Does that refresh your recollection that the question of what was in your sample and how it came up, and you answered that you thought it was the case that the rest of them were

definitive, but you hadn't specifically investigated that question?
A. I think that answer is fair.
THE COURT: Is that different than what you just said a minute ago?
THE WITNESS: Well, since then I have gone back and looked at the sample again to see if this is right, but unfortunately, I did that several weeks ago too, and I don't remember the precise answer to this question. But I can answer this question now, I do have it in my work papers.
THE COURT: All right. Go ahead.
BY MR. COFFEY:
Q. In the course of your investigation, did you come up with any basis to believe that your answer that you think it's the case at your deposition was wrong?
A. I could go back and check that. That's what I would do to answer your question completely.
Q. But you've done nothing that would suggest that your answer, at least initially "I think that's the case" was wrong?
A. Yes, I have done something since then to check whether I was right or wrong. I don't remember the answer to that check, but I believe I have it in my work papers, my subsequent work papers.
Q. All right. Let's take a look at Exhibit 2 to your trial affidavit. We will look at the bottom one, the bottom part of

this because that focuses on your findings. I note that the report, at least when I read it, said initial bidders, and then it talks about rival bidders.

Do I understand your testimony today that a bidder might be somebody who doesn't make a definitive offer or isn't it the fact that we're talking about definitive offers here?

A. I'd have to check that to be sure, and partly the reason it's confusing is your use of the word definitive because rarely is an offer so definitive that it can just be accepted. There's usually regulatory hurdles and whatnot that have to be gotten over, and the M and A databases that we work with don't go into that level of detail.

Q. Was the Boston Scientific offer January 8, 2006, was that a definitive offer?

A. I would call it one, but I'm not a legal expert on what that word definitive means. I would suspect that even if Guidant had said yes, they couldn't have closed the deal on January 9. There would be hurdles they would have to go through.

Q. Let's turn to page 84 of your deposition.

THE COURT: Page 84 or paragraph?

MR. COFFEY: I'm so sorry, page 84 of the deposition.

THE COURT: The deposition, I'm sorry.

MR. COFFEY: Yes. Line 18. I want to explore this a little bit more.

Q. If you will follow along, it should be on the screen. We are going to start at line 18 and go through line 10 of the following page. Again, the examiner asked you:
"Q. OK. And did this data set -- does this data set show which -- in which of these cases the second offer was a definitive offer as opposed to a preliminary indication?
"A. It doesn't, but I think most, if not all, were -- were definitive offers because that's how they get into the data set. I don't know that preliminary indication's gotten into the data set."

Does that your fresh your recollection that 17 deals that made it into your data set and made it on to slide Exhibit 2 of your trial affidavit were instances in which a second bidder arrived on the scene and made a definitive offer?
A. It refreshes my recollection of what I said, but I believe I was wrong then.
Q. But we do know Reckson was an instance in which there was a tentative proposal and no firm definitive offer, right?
A. I believe so, yes.
Q. We know that that was excluded from your database, right?
A. We do -- well, I did it both ways. I shouldn't say I exclude it. I mentioned what the average statistics would be with and without it, but I believed it should be excluded.

THE COURT: So you evaluated whether in that case the initial offer price was in fact the price at which the transaction got done?

THE WITNESS: It was the price at which the transaction got done.

THE COURT: It was.

Q. And you would agree with me that the Reckson scenario boiled down to its essential elements is the deal that most closely approximates Professor Jarrell's "but for" scenario which is that there is a preexisting offer, there is a tentative proposal at a higher price, there is no subsequent firm offer from that potential rival bidder, and the shareholders are left with the first bid or a stand-alone company. You understand that's Professor Jarrell's hypothetical that he's addressing in his damages report, right?

A. That sounds like what Professor Jarrell was addressing. It doesn't sound like the Boston Scientific transaction to me.

Q. But what I just described also sounds like Reckson, doesn't it?

A. You'd really have to ask Professor Jarrell if that's what he had in mind. He had access to my Reckson example.

Q. I understand. I've moved over from Professor Jarrell and I'm posing the same question the points I made about there's a first bid that's definitive.

There is a potential rival bid that is at a higher price but tentative. There is never a follow-up firm offer, and what the shareholders are left with is the initial bid or a

stand-alone company. I'm asking you if what I just described sounds like Reckson?
A. No, I thought Reckson was a unique example involving Carl Icahn where the second bid was not a legitimate economic bid as I described and would therefore bias my sample and I chose to exclude it.
Q. Well, it was a bid -- it was a deal in which there was a preliminary interest of -- there was an indication of interest that was non-binding, correct?
A. That is correct.
Q. There was no subsequent firm offer. Isn't that correct?
A. Well, there was a subsequent offer. When you say it wasn't firm, I don't recall the details of Mr. Icahn's subsequent offer and whether you would characterize it as firm or not.
Q. Well, how many of the precedents in your data set involved second, you know, topping bids, using your terms, that did not result in definitive offers?
A. I'd have to go back and check one at a time.
Q. Are you aware of any?
A. Well, not as I sit here, no. I just don't have that committed to memory.
MR. COFFEY: Marco, I'm going to go right to paragraph 26?
THE COURT: Paragraph 26.
MR. COFFEY: Of the trial affidavit, yes, please.

Q. Now, part of your critique of Professor Jarrell is pointing to deposition testimony and the comments in the marketplace which you say indicates that J&J would have been unable to acquire Guidant for $63 a share after Boston came on the scene, so I want to talk to you about that.

You quote from the deposition testimony of a J&J employee, Mr. Darretta, Robert Darretta -- do you see that?

A. Yes.

Q. -- as support for that proposition. So first I put up on the screen what you say in your affidavit. This is an actual excerpt from the deposition. What I want to do is point you to the next question and answer.

So, in the part you quote, you indicate that you focus on the fact that "over the course of time, Johnson & Johnson, or at least Mr. Darretta recalled this, determined that their initial bid would be inadequate."

You notice he says "over the course of time" there in his answer?

A. Yes.

Q. Now, let's look at the next question and answer which is not in your report. Can we get those synched up, Marco.

I'll read it aloud.

"Q. And what was your determination?"

There is a question that is excerpted in the affidavit is page 70/lines 15 to 23, I would like to call up the next question and answer, please. The next question.

"Q. So in December 2005, although not necessarily December 6, 2005, you determined that the $63 bid for Guidant would not be adequate to complete the acquisition of Guidant Corporation. Is that right?

"A. And I'm not sure of the date of our revised bid, but we certainly would have had those discussions during December, and we concluded those deliberations prior to making the enhanced offer."

Do you see that?

A. Yes.

Q. Do you notice that the examiner didn't clarify for Mr. Darretta that J&J made its revised bid in January and not December? Do you see that?

A. Well, it would be easier if I didn't have this big block on the screen because, it's just -- why don't I just look at the complete pages?

THE COURT: I think it would be easier for me too. We can read it. It's small, but it's not too bad.

The question is beginning at line 15 on page 70 is what is referenced in the affidavit. Is that correct?

MR. COFFEY: That's right, your Honor. It's page 70/lines 15 through 23.

THE COURT: And you want us to consider lines 24 through 25 on page 70 continuing on to page 71 all the way to line 8. Is that right?

MR. COFFEY: That's right, yes, your Honor.

A. OK, I've got that.

Q. Right. And so the witness is tying the deliberations up to and including the time that the enhanced offer was made. My question is, you see that the examiner didn't clarify for Mr. Darretta that the revised bid was made in January. Do you see that?

A. Well, he doesn't say that it was made in December.

THE COURT: He's talking about discussions made in December.

THE WITNESS: Yeah, discussions in December, but it could have led to a bid in January.

Q. Right. My point being that it wasn't until -- let me move on to the next question because I think I will wrap them all up with another question.

You also quote from the testimony of Dominic Caruso?

A. Yes.

Q. In paragraph 27. Call it up on the screen, this excerpt. Having reviewed those two, would you agree with me that you saw nothing in either of those excerpts of testimony which suggested that J&J thought it would need to increase its bid if Boston Scientific decided not to make a definitive offer. Isn't that right?

A. That doesn't say one way or the other.

Q. Nor did you see that in the testimony by Mr. Rosenberg which you also quote in this section, right?
A. Again, it does not say one way or the other.
Q. Now, Boston Scientific's firm offer was on January 8, 2006, right?
A. Yes.
Q. And you'd agree with me that Johnson & Johnson made no increase in its bid prior to January 8, correct?
A. That is correct.
Q. Johnson & Johnson did not make an enhanced offer until January 11, several days after Boston made its definitive offer. Isn't that right?
A. I remember it's several days after, yes.
Q. Now, isn't the fact that Johnson & Johnson did not raise its offer until after Boston Scientific had put a firm offer on the table the best evidence that Johnson & Johnson had no intention of increasing its offer beyond $63 per share unless and until Boston Scientific in fact made a firm offer?
A. I don't think you can draw that conclusion just from that one observation, no.
Q. You will agree with me that they didn't do so until after the firm offer from Boston, right?
A. I will. I agree to that.
Q. Now, you did read the depositions of Johnson & Johnson's witnesses, right?

A. Yes -- well, when you say witnesses, some of them.
Q. Some of them. Did you pick what you reviewed or were they provided for you?
A. I don't really recall. I think I picked it, but it's been some time.
Q. Do you recall in any deposition that you were shown where any of Guidant's lawyers put any question to any Johnson & Johnson witness about whether Johnson & Johnson thought it would need to increase its offer if Boston did not come forward with a definitive offer? Do you recall seeing such a question in any of the depositions you reviewed?
A. I don't recall such a question.
Q. Are you aware that Judge Sullivan put that question to Johnson & Johnson management during this trial?
A. No.
Q. So as you took the stand today, you were not made aware of testimony that was arguably touching on this part of your trial affidavit, that testimony of J&J management on the issue of whether J&J felt it should make an offer, increased offer without Boston Scientific first making a firm offer. You're not aware of that testimony?
A. I am not.
Q. Let me call up just a very brief clip -- not clip -- a transcript. It's of Bill Weldon, former chairman of Johnson & Johnson. This is given in response to a question from the

Court after colloquy about Johnson & Johnson management planning for the possibility of that counter. The judge specifically asked a question that was not asked in the depositions.

"Q. What was the plan had Boston Scientific not made a definitive offer?

"A. We would have gone forward at $63."

Do you see that?

A. I see that.

THE COURT: That's my question? Usually, it says "The Court" when I ask a question.

MR. COFFEY: Your Honor, I'm so sorry. You asked the follow-up question. I'm so sorry.

A. That's just the question I would have asked.

Q. You would have asked that question?

A. Well, it's the first thing comes to mind when you see the question and answer.

THE COURT: My follow-up is what's on there. "You're confident shareholders would have taken it at $63?" And there's a lengthy answer. I'm not going to read it. We already have the transcript.

Q. Let me rephrase that. That question was posed in this courtroom, and you just -- I think you just said that was a question you would have asked, right?

A. Yes.

Q. Because that kind of direct question and that kind of direct answer would inform your judgment about whether Johnson & Johnson actually felt it needed to increase its $63 price in the face of no firm offer by Boston, right?
A. Well, I can't really say that. It may have. I'm just saying that when they say go forward and it takes two to tango, I'd immediately want to know who the tango partner is.
Q. You talk a bit about analysts' reports in your trial affidavit, so I'd like to go to paragraph 30 of your affidavit. You discuss your review of certain analysts' reports issued between December 5 and December 9, 2005, which you say reveals that "most of those market professionals who explicitly discuss J&J's $63.08 bid stated that either J&J was going to have to raise its initial bid in order to acquire Guidant or that J&J would not win with its $63.08 bid."
Do you see that?
A. Yes, I do.
Q. Now, in your review, you culled out 18 reports from the three dozen or so that were issued during this period that covered the transaction and discussed either the credibility of the Boston Scientific's bid or the likelihood of J&J acquiring Guidant for $63 a share. Is that right?
A. That's what I remember, yes.
THE COURT: So you had 577 total: 29 that you identified as involving second or multiple bids. And from that

you culled down to 18. Is that right?

THE WITNESS: But he's asking me about the analysts' reports now, not -- these are analysts' reports commenting on Boston Scientific's bid after the bid.

THE COURT: And there are three dozen of those.

THE WITNESS: I recall there being fewer, but my actual sample is in an exhibit to my trial testimony which is, I think, Exhibit 4. Yes. Exhibit 4 was the content analysis I was able to find from the way market analysts responded to the bid in the week of the bid.

BY MR. COFFEY:

Q. You say that of these, seven analysts stated that they believed Johnson & Johnson would not win the bid at $63, and one thought that -- the one that thought there was -- and one that thought there was a 50 percent likelihood that it could win the bid at $63, right?

A. Yeah, there were -- yeah, eight who offered an opinion on that that I recall seeing: 7 said they wouldn't get it at $63 and one thought 50/50.

Q. Now, these analysts were factoring into their analysis publicly available information, right?

A. Yes.

Q. So none of those analysts knew, as we do now know, that there was a secret nonpublic condition that had to be satisfied before the board would permit Boston Scientific to make a firm

offer, right?
MR. OHLMEYER: I object to that.
THE COURT: Let's make sure the witness understands what Mr. Coffey means by that the secret nonpublic factor. Do you understand what he means? I do.
THE WITNESS: I think he's talking about the deal with Abbott and so forth.
THE COURT: In other words, there needs to be a signed-on-the-dotted-line divestiture partner before Boston Scientific would have made a definitive offer.
THE WITNESS: Yes.
THE COURT: Is that what you mean?
MR. COFFEY: That's what I mean, your Honor, and I'll throw back the rhetoric a little bit.
THE COURT: I got it. There's no jury here and as soon long as the witness gets it.
THE WITNESS: I get it.
THE COURT: And you understand that.
THE WITNESS: Yes.
Q. And none of those analysts knew, as we know now, that the divestiture party that Boston Scientific had lined up, Abbott, would not agree to go forward without getting confidential Guidant information and getting it in a manner that did not require its identity to be disclosed to Johnson & Johnson. The analysts didn't know that fact either, did they?

A. Just to be clear, the analysts never know some of the hidden details of any transaction. They're just dealing with the public information. But I imagine they would think there are specific complexities in any transaction they analyze. That said, they relied on the public information.

THE COURT: But the need for a divestiture partner was no secret, right?

THE WITNESS: I think the general need that they may have antitrust problems that would have to be solved wasn't a secret.

THE COURT: Do you remember that December 5 announcement specifically addressed the need for that?

THE WITNESS: Yes. Now that you bring it up, I recall that it did, yes.

Q. Do you recall that the December 5 proposal did not indicate to the public the Boston board's view that that divestiture party had to be lined up before they would even make a firm offer? That wasn't in that December 5 letter, was it?

A. I don't think so, but I'd have to go back and re-read it to be sure what is and is not in there.

Q. Right. So this condition inside Boston Scientific that it's not going to go forward with a firm offer unless and until it lines up a divestiture party in advance of the firm offer was a condition that was not known to the market, right?

A. Yeah. If it was even, as you say, a condition, it was a stated condition, but whether it would have really been a condition if push comes to shove, we don't really know that either.

Q. Because one scenario was that Boston Scientific do what Johnson & Johnson did, right, which was sign a definitive deal and then handle the divestiture issues, right?

A. I would imagine that would be a possibility.

Q. Or another possibility could be that subsequent to December 5, Boston Scientific lines up a joint bidder, and together with this joint bidder they make a public offer, a takeover proposal that includes a divestiture party as a joint bidder. That's another scenario that could have played out, right?

A. It seems like that's another possibility. Yes.

THE COURT: I guess another one would be that Abbott would be willing to sign on the dotted line without due diligence.

THE WITNESS: Yes. And another one I could think of --

THE COURT: Is this Eleanor Roosevelt flying? Is that where we're going with this?

THE WITNESS: Maybe. If we all get to put forth possibilities, another one I thought of is you let them know that you are putting a definitive $72 offer together, and you let the vote go ahead, and the shareholders can say, well,

we're willing to take the $72 chance and we'll vote no on the $63.
Q. In any event, none of the analysts suggested that if Boston Scientific decided not to make a definitive offer, J&J's deal at $63 would not be approved. Isn't that right?
A. I don't recall anything specifically calling out that scenario.
Q. One of the opinions you render is that Johnson & Johnson could not have gotten Guidant at the $63 number even if Boston never made a firm offer. Isn't that right?
A. I think that's -- when you say never, even if they didn't make a firm offer prior to the shareholders' vote because never is a long time.
Q. What would you consider to be a period of time after someone makes a public tentative proposal subject to due diligence as firm financing lined up, financial advisors lined up, and then doesn't pull the trigger on a firm offer before you think that they've effectively left the stage. Do you have any of time frame?
A. Well, they can -- one possibility is they can leave the stage for awhile and come back to the stage, the way Johnson & Johnson did. They were there at $67. They went away. They came back. But I don't really have a firm answer to your question.
Q. You're aware that when Johnson & Johnson and Guidant

executed the amended merger agreement in November of 2005 that the price of $63 was a premium over the Guidant price in the days prior to that announcement of the amended merger agreement?
A. I remember that.
Q. Let's skip ahead to another analysts' report in December of '05. PX-54 please. It's in your binder if you want to look at it. We'll call it up on the screen.
This is a Lehman Brothers equity derivatives research report dated December 12, 2005. And if you will go to page 3, it's gaining out various scenarios. And the one I want to focus on is the "but for" world that Professor Jarrell's damages report is based on.
A. OK, so this is after the period for which the sample of reports were in my affidavit. So this is not one that I cited, but this is a new one.
Q. That's right, sir. This is a couple days after the end of the period that you used to sample analysts' reports. So this is December 12, this is a week after Boston Scientific's tentative proposal. If you will please, sir, turn to page 3. I've got it on the screen. This is scenario D, value of the existing J&J offer on 1/15/06 if Boston Scientific decides not to pursue Guidant. Do you see that?
A. OK.
Q. And the report states, "In this scenario, we would expect

the market to assign approximately a nine percent break-even probability to the Guidant/J&J deal with one month remaining to go before completion. If BSX walks, the market will likely perceive that as a sign that J&J is largely justified in its price cut." Do you see that?

A. Yes.

Q. My first question is: You would agree that this report is contemporaneous evidence of all of these -- at least one person in the marked viewed the likelihood to be of the J&J merger being approved by shareholders if Boston Scientific decided not to pursue Guidant, right?

A. That's what it looks like, yes.

Q. And you have no reason to disagree with this analysis, do you?

A. Let me finish reading it. Well, the analysis really depends on what he means by "walks." I mean, they announce that they make a noisy retreat, "we are going away; we've done some further work; and we're not going to make a bid." If that's what he means by "walks," I probably don't disagree with this.

(Continued on next page)

Q. I want to talk a little bit about stock price, the impact of stock prices on your opinions, Professor. So let's turn to Page 33 of your trial affidavit. And --

A. Page 33?

Q. Paragraph 33.

A. I was going to say.

Q. It's on Page 14.

A. It wasn't long enough. Okay.

Q. And you cite to contemporaneous analyst reports indicating that many investors thought the $63 price was too low; do you see that?

A. Yes.

Q. And then in the next paragraph, paragraph 34, you ask the Court to consider what one would expect to see if, in fact, Mr. Jarrell is correct that Johnson & Johnson would have acquired Guidant in $63 but for the alleged breach; do you see that?

A. Yes.

Q. And you posit that if market participants believe this was likely -- if market participants believe this was the likely -- potential outcome, Guidant's share price would have traded at $63.08 because, ultimately, they would have known that this was likely -- the likely relevant value of Guidant's shares; do you see that?

A. Yes.

Q. So do I take it that you're suggesting that Professor Jarrell's assumption is likely wrong because Guidant's share price traded at above $63?

A. That is, in my opinion, evidence that the opinion is incorrect, yes, or that the probability being, one, that it would be acquired at 63.08 is incorrect.

Q. Now, I talked before about what the analysts did and didn't know; so let me turn to the market, generally. You'd agree with me that the market did not know that the Boston Scientific board would not authorize the company to go forward unless and until it had a sign-on-the-dotted-line divestiture partner, right?

A. It would be my opinion of what the market knew and what sophisticated analysts knew is pretty much the same set of information, and as I testified earlier, it doesn't include the fact you just mentioned.

Q. Both of those, the Abbott factor and the Boston Scientific board factor?

A. That's correct.

Q. Right, and --

A. As far as I can recall, it doesn't include either.

Q. And based on your experience, if a number of conditions like that were then to enter the bloodstream of the market, would that tend to depress the market's view about whether the Boston Scientific is likely to occur or enhance the

expectations?
A. Well, you know, I can't say for sure because the market price hasn't gone up to 72 either. So to use an investment banking term, the market is aware that all these deals are very complex and, quote, have a lot of hair on it. In this case, the hair would be, among other things, the two things you bring up. So the market is putting in discounts for the fact that there may be things that we don't know that are complex that could derail this deal.
Q. Let's take the scenario where that's the state of play on Monday, but on Tuesday morning, two of the pieces of hair are specifically identified, and they're no longer conjecture but the market now knows, hey, Boston is not going to make an offer unless and until they have a sign-on-the-dotted-line divestiture partner, and the one they've picked to do it isn't going to go forward unless it gets confidential information and J&J is kept in the dark about their participation.
Now, if that's introduced into the bloodstream, that would tend, to the reasonable market participant, increase the chance that this deal may not happen?
A. I think that would probably have occurred, and I suspect that would probably depress the stock price somewhat.
Q. Now, you say in paragraph 35 that you looked at the price movements of Guidant stock, and you point out that it went up above $63 per share in the period between December 5 and

January 8. What I'd like to do is call up Exhibit 6 to your trial affidavit, and we highlighted that period on the chart. Now, eyeballing that, Professor, you'd agree with me that, for the most part, the price during this period was in the $66 range, thereabouts?
A. Yes.
Q. You'd agree with me that that is not even halfway between the $63 price in the J&J contract and Boston Scientific's non-binding indication of interest at $72, right?
A. That's an empirical fact, yes.
Q. And if you were going to make it a -- because the Judge likes football, if you were going to make this a standup football grid, they're on about the 35-yard line, right? Between the J&J end zone and the Boston Scientific end zone, right? It's about a third of the way?
A. Give or take, yes.
Q. I'd like to show you a document marked as Plaintiff's Exhibit 55. It's a Reuter's news article.
THE COURT: Is this in the binder?
MR. COFFEY: It is, your Honor. Exhibit PX55.
Q. And this, I think, falls in the period that you selected for your selection of analysts. This is not an analyst report, obviously. It's a Reuter's article, but just to put it in context, and you'll see here --
A. And this is 55 in the binder book?

Q. Yes, sir.
A. Okay.
Q. Are you with me?
A. Yes.
Q. Okay. So you see it's a Reuter's article on December 7th, and the headline, "Guidant stock price not reflecting bidding war;" do you see that?
A. Yes.
Q. So I'm going to read a little bit of it, and then ask you if you remember reviewing this in connection with your report in this case. So in the first paragraph you see there's reference to, the Guidant shares trade as if there will be -- go back, please, Marco -- trade as if there will be no bidding war reflecting what traders and analysts have said. Do you see that?
A. Yes, I see that.
Q. If you go down a couple more paragraphs, there's, at least in the reporter's view, that reflects downright scepticism over Boston Scientific's highly leveraged acquisition. They term it offer but we know it's a proposal. And then a couple more paragraphs down, a couple of folks are quoted, noting there's a risk you'll never see the $72 and some arbitrageur said the shares and options were trading as though the bid was not real; do you see that?
A. I think that's an odd statement to make, because it's

written on paper. I don't know what he means by "wasn't real." What that is probably the euphemism for is there is complexity that may lead to a deal not being completed.

Q. Or an offer not being made?

A. Well, what you've called a definitive offer not being made.

Q. Well, let's try and nail it down. What do you mean by "definitive offer"?

A. I really don't have a good def- -- what I mean by definitive offer means what exists in the stock market. If IBM is at 153.1 to 153.11, I can push a button on my computer and the transaction is done, that's a definitive offer. I can hit the bid. If I can't hit the bid, in my mind, it's not definitive. That, I think, is too strong a criterion for any merger and acquisition transaction.

Q. Forgive me if you've answered this already. What, in your opinion, was the proposal that Boston Scientific sent to Guidant on January 8th, 2006, a definitive offer?

A. I agree with you it was more definitive, but I said that term definitive is really a legal term, and it's the only way I, as an economist, use the term definitive is something I can hit.

THE COURT: So in your view, $63 a share, Johnson & Johnson offer, was not definitive?

THE WITNESS: Yeah, and that's why I don't want to be -- the answer to that question definitive, because I view it as largely a legal one. None of them are definitive in the sense that it's a bid that you can hit and the transaction is done. There's always going to be regulatory review, and I've looked at some of the legal literature on this. I know how complex it is.

THE COURT: All right. But I guess you understand we've been using the term to mean a bid that the Guidant board can accept?

THE WITNESS: Yes, and/or the more definitive --

THE COURT: That would bind the offer on the acquirer?

THE WITNESS: Yes, I understand.

BY MR. COFFEY:

Q. Now, having looked at the parts of this article, do you recall whether you reviewed it in connection with the preparation of your report in this case?

A. If I did, it was prior to my deposition, and I don't remember it.

Q. Would you agree that the observations here are contemporaneous evidence of how some market participants perceived the Boston proposal?

A. I think that's fair.

Q. Professor, do you -- this is probably unfair. Do you happen to know what price Guidant closed at out at the end of the year on December 30, 2005?

A. Well, if we go back a couple of exhibits, we could know. I think it was about 68 bucks.

THE COURT: 68?

THE WITNESS: 68, yeah.

BY MR. COFFEY:

Q. Let's firm that up. I'm going to represent to you that the next thing we're calling up is an except from Jarrell Exhibit 1, which is in your -- Jarrell Exhibit 1, Exhibit 3 to that, Page 6 of 7, he included a stock chart. I don't think this is going to be controversial.

So this is an excerpt from a stock chart that's in the record and it notes that on December 30, 2005, Guidant was trading at $64.75; do you see that?

A. I see that one number, but I'd like to just see the context, too. Can you blow up some of the ones below it, or just make it so it's not so tiny around the end of the year?

Q. What would you like, plus, minus seven days?

A. That's good. I think that's -- I'm wrong about the 68, but not very wrong.

Q. It was an unfair question. I knew I shouldn't have said it. I should have gone right to this?

A. Okay. So there's the date.

Q. Now, on December 30, the market knows that J&J and Guidant have a signed definitive agreement at $63.08, right?

A. Yes.

Q. And the market knows that Boston Scientific has a

non-binding proposal out there at $72, right?
A. Yes.
Q. Now, despite the market knowing the 72, 63 difference, Guidant closes at only $64.75 at the end of the year, right?
A. Yes.
Q. Now, let's go back to your Exhibit 6, the stock chart, and put the arrow on there. There we go. I think that's where that $64.75 is. Now, by my math, that number is -- and it was trading up and down around that, but this is the end of the year; so we'll use it. That number is only $1.67 over the J&J price, but it's $7.25 below the Boston Scientific tentative offer at 72. Are you with me on the math?
A. Yes.
Q. And so I guess if I want to use the football analogy again, we're back on the 20 now; we're even closer to the Johnson & Johnson price?
A. Yes.
Q. And we're not just pennies closer, we're several dollars closer, right?
A. Yes. I always worry about year-end, very year-end data because it's the end of the year or end of the quarter for institutional investors. There's tax issues, but nonetheless, your empirical observation is correct.

THE COURT: That's because the market has factored in the risk that this is never going to blossom into a real offer, right?

THE WITNESS: Yeah, there's no question they factored that in, but I think the -- that's in, if you go back, your Honor, like to the 20th of December, this very year end being particularly low, I think may be things unrelated to the offer.

THE COURT: But before December 5th, when the only offer on the table was $63 a share by Johnson & Johnson, the price of the stock was less than that because the market had factored in that this also might not be a sure thing?

THE WITNESS: Yes.

THE COURT: Okay.

BY MR. COFFEY:

Q. I take your point about the end of the year, Professor, but am I right that the two yellow -- the yellow lines highlighted on Exhibit 6 are there because, in your report, you rely on stock prices at that time of the year, right?

A. Oh, I put it in there. I mean, it is what it is.

Q. So are you now caveating that by saying we shouldn't give it a hundred percent credit because it's the end of the year? Because I didn't see that in the --

A. I looked at the whole interval because, to me, it was trading about the 35-yard line, like you said. I wouldn't give too much credence to the fact that it seemed to go to the 15-yard line at the end of the year.

THE COURT: And after the beginning of the year, it starts moving up. They get a couple of first downs.

THE WITNESS: Yes.

MR. COFFEY: Going to pay for the metaphor.

THE COURT: This is the only forward progress I've seen all year, except when the Jets took themselves out of first round draft pick running by winning.

BY MR. COFFEY:

Q. Would you agree that Guidant's stock price on December 30 implies that the market believes that J&J's deal is more likely to happen even though the market knows that Boston has a proposed deal out there at 72?

A. Well, the market's got to worry about neither of them happening, too. It's not a binary consideration. Both -- I mean, there could be a bidding war, neither could happen, one of them, Johnson & Johnson, could go away, like I said, and then Boston could reduce its offer. The market is trying to weigh all the possibilities.

Q. Now, I'd like you to assume that on December 30, Boston Scientific publicly withdraws from the bidding war, potential bidding war, never makes an offer. Do you agree that Guidant's stock price would decline below $64.75 by some amount based on that news?

A. It depends on exactly what that news was. If they said we're gone forever, we've looked at the company, we don't think it's worth it, then I think that could happen.

THE COURT: Would likely happen?

THE WITNESS: Yes. The key thing would be the market would be very interested in how Boston Scientific, which is a very sophisticated entity, is bound to Guidant. If they say we're walking away and we're walking away because we don't think it's worth it, that would be very negative news to the market.

BY MR. COFFEY:

Q. And enhance the chances that the J&J deal at 63 would be approved by the shareholders; isn't that right?

A. Probably so.

Q. I'm going to talk about arbitrageurs just little bit, sir. You say in your affidavit that since a substantial block of stock was held by arbs, who purchased at an average price of $68 and change, they were likely to veto a deal at 63 because they would lose money, and I just have two questions on this.

If Boston makes a definitive offer and the board at Guidant determines it's superior and accepts it, then there is no shareholder vote on the J&J deal for those arbs to vote against, right?

A. As far as I could see, that would be correct.

Q. So this veto only arises in a scenario where Boston hasn't made an offer that has been accepted by the time of the shareholder vote on the J&J deal scheduled for January 30, right?

A. That would be something along the lines of Boston saying that there are impediments to us making a definitive offer, we're not going to be able to do it by the shareholder vote, but we're still interested in this company.
Q. Now, there's nothing in your report that cites to this proposition that Boston Scientific would not make a definitive offer but would remain interested in the company, right?
A. I don't specifically draw out that scenario, as I recall. There's just so many possibilities.
Q. Well, you don't allude to any evidence that supports the proposition that Boston Scientific would, on the one hand, not make a firm offer but, on the other hand, would remain interested in the company; isn't that right?
A. Well, there is the evidence that they'd remain interested because they not only made a definitive offer, but they raised it, but they were able to do so fast enough, in their view, that the other scenario never came into play.
Q. Well, you understand that in this phase of the trial, we're assessing damages, which presumes that the Court has found liability and the "but for" world that Johnson & Johnson is putting forward is that Boston Scientific never would have made that firm offer. Do you understand that's Professor Jarrell's assumption?
A. I think that is Professor Jarrell's assumption, yes.
Q. Now, about arbitrageurs, I guess I have one more question

or a couple. I think we can all agree and stipulate that they like to make money. I think that point is made in your affidavit, right?
A. True, and it's not just true of arbitrageurs. It even applies to lawyers, but yes.
Q. Well --
THE COURT: Not judges. It doesn't apply to us.
THE WITNESS: Notice I left you out, your Honor.
BY MR. COFFEY:
Q. Some lawyers take more risks than others, too. But arbs are part of a business infused with risk, right?
A. Yes.
Q. You make money sometimes, you make a lot of money, and you lose money sometimes, right?
A. Correct.
Q. So while it's important to make money as an arb, it's also important to cut losses, if you need to, right?
A. If you have to.
Q. So you're not opining here that arbitrageurs will never sell below their basis, are you?
A. No. If they feel they have to, they will take their losses, like anyone else. My only point was that they will be highly incentivized to do all they can to keep Boston Scientific in the game.
Q. Well, if the arbs believe that the options are to take the

$63 from J&J, $63 offer from J&J, or let Guidant remain as a standalone company, their decision will have to be based on what they believe Guidant is worth as a standalone company; isn't that right?
A. If those were the choices, that's what they'd have to do.
Q. Now, I want to call up exhibit 5 to your affidavit, please. It's another stock chart, and I want to point to this period of time, the lower left part of Exhibit 5. And you see that the Guidant stock, prior to the announcement of the renegotiated merger agreement on November 15, was trading at around 56 or $57 a share; do you see that?
A. Yes.
Q. And when the revised deal was announced, the stock went to just under $63; do you see that?
A. Yes.
Q. And that was an indication that the market believed that this deal was likely to close, wasn't it?
A. Relatively likely, yes.
Q. Thank you. We can take that down, Marco. Thank you.
Now, you understand that Professor Jarrell's preferred measure of damages is the difference between the price at which J&J contracted to purchase Guidant and the investment value of Guidant to Johnson & Johnson, as evident from the amount that Johnson & Johnson was prepared to pay for Guidant, don't you?
A. I understand that that was -- I think he said in his

testimony that was his preferred method.
Q. And he refers to the amount that J&J was prepared to pay for Guidant as Johnson & Johnson's "revealed preference;" do you remember that?
A. That's when he was talking about the bids, as I recall, yes.
Q. Yes. You're familiar with the concept of a revealed preference?
A. Yes.
Q. A revealed preference refers to behavior that demonstrates the value that a person places on something like an asset?
A. That's one context in which it's used, yes.
Q. And as used here, per Professor Jarrell, the amount that Johnson & Johnson was prepared to pay for Guidant demonstrates the value that Johnson & Johnson placed on Guidant; isn't that right?
A. Well, Jarrell was using that term, but it got a little confusing to me when he applied it in a situation where they hadn't actually made a bid.
Q. Are you talking about the $75?
A. Yes.
Q. Okay. With that caveat, do you agree with my prior question that the revealed preference is the amount that Johnson & Johnson was prepared to pay for Guidant and it's evidence of the value that Johnson & Johnson placed on Guidant?

A. That's what the concept of revealed preference says.
Q. Now, the price of $63.08 when that was negotiated, that showed a revealed preference that, at that time, Johnson & Johnson valued Guidant by no less than that amount, right?
A. Presumably, that would be the revealed preference answer, once again.
Q. And presumably, if it's willing to pay $63 for something, it's hoping to get some value on top of that, right?
A. Generally, yes.
Q. Right. Now, you have no reason to -- well, you cite no evidence in your affidavit contrary to the proposition that Johnson & Johnson was prepared to make a $75 bid for Guidant, right?
A. I don't recall evaluating that one way or the other.
Q. Do you recall being asked in your deposition that question and saying, no, you had no reason to question that?
A. Really just gave the same answer now. Really, that is still my opinion. I don't have an opinion one way or the other.
Q. And that $75 planned bid indicates a revealed preference that Johnson & Johnson valued Guidant at no less than $75, right?
A. Well, that's why I say it gets a little sticky. Revealed preference usually means revealed by an actual action; so the 68 and the 71 would be examples of the concept. But a planned

action? I don't believe he used revealed preference in that context.
Q. Well, the 71 you anticipate, 71, you would consider revealed preference?
A. I think so.
Q. And so it's a revealed preference because it reveals what the purchaser -- how much the purchaser values the asset, right?
A. It reveals that they should value it at least at 71 if they're rational, yes.
Q. And the important part of that analysis is the number that they have concluded that they're willing to pay, right?
A. I think so.
Q. All right. So if Johnson & Johnson -- hypothetically, had senior management concluded that they were about to make a $75 offer, but it had not yet been communicated, what's important there is that they had come to that conclusion of value even though they had yet to communicate it; isn't that right?
A. Well, maybe, but how do you know they really -- the whole point of revealed preference is it gets around this internal mechanism by saying, you did it and I can see it. So what you're suggesting is some other theory than revealed preference. Maybe it's an appropriate one, maybe it's not, but it's not revealed preference.

Q. Okay. So now, let's just zero in on that for a second. If the reason -- if the reason that the number isn't communicated is because -- another scenario. The number isn't communicated because there are second doubts -- second thoughts on the part of the acquirer, that could be -- I think that speaks to what you just said, right?
A. It could not be communicated for a lot of reasons, but the whole concept of revealed preference is to avoid getting in disputes like, why wasn't it communicated? Why wasn't this done or that done, and to look at what just actually happened.
Q. But you talk about a number of reasons why it might not be communicated, but I'm trying to tie this back to your prior testimony about what's important here is the assessment of value just prior to the communication.
And if the reason it's not communicated is because of an external reason that it would be futile or that -- that it would be futile, and that's the only reason it's not sent, you'd agree with me that that value does speak to what the potential purchaser feels about the value of that asset, right?
A. Well, depending on the record, it may. I'm just saying it's not revealed preference. You're now offering another explanation for why that number might be used as a measure of their perceived value.
Q. Would your view change if you knew that the Chairman of J&J asked the Chairman of Guidant if they could get a deal done at

$75?
A. Well, it wouldn't change regarding whether it's revealed preference or not. We're now arguing about how strong the evidence is that J&J felt confident that it was willing to bid 75, even though it did not.
Q. Well, I guess this tweak in my hypothetical now involves actually communicating to the seller the number 75, can we get this deal done at 75. All right? So it's not just keeping it internally, it's actually conveying it. Does that give it more weight, in your view?
A. I think it might give it more weight, but I still wouldn't call it revealed preference, if it's not what you referred to previously as a definitive bid.
Q. Well, if J&J believed that a transaction of $75 per share would be a positive net present value to J&J, you would agree that that bespeaks a revealed preference of $75?
A. Again, we're sort of quarreling over the definition of revealed preference. I would agree that it's some evidence of what they valued the company at, but I don't think it's revealed preference. Revealed preference means revealed by an actual action, and I thought think Professor Jarrell meant an actual bid from the real world.
Q. So in your view, a discussion between the chairman of the two companies, can we get this done at 75, is not a revealed preference?

A. In my view, it would not be.

THE COURT: It might still be a valuable way to assess value, but not a revealed preference, as the term is defined, as you understand it?

THE WITNESS: That's my answer.

THE COURT: Okay.

BY MR. COFFEY:

Q. Okay. Let's go to paragraph 40 of your trial affidavit, a discussion about the DCF calculations. And in this section you opine that Professor Jarrell's damages calculations are highly sensitive to the uncertainty as to the investment value of Guidant to J&J; do you see that?

A. Yes.

Q. But his damage calculation is the revealed preference, right?

A. Well, but the revealed preference only has validity, in my mind, to the extent that it reveals the underlying valuation. So the driving force behind the entire thing is the credibility of the underlying valuations.

Q. Well, you would agree with me that Johnson & Johnson is a sophisticated investor in the healthcare area?

A. I don't -- Well, it's an awfully big company. So when you say Johnson & Johnson, I presume you mean certain people within it, but I don't have any evidence to the contrary.

Q. Right. And you understood -- you understand that Johnson &

Johnson was willing to put tens of billions of dollars at risk in bidding on Guidant, right?
A. That's a fact.
Q. Right. And so you're not prepared to say that Johnson & Johnson was making these bids willy-nilly, right?
A. No, I would not say that.
Q. But you do criticize Professor Jarrell because of his, at least part of his report, discusses DCF valuations; isn't that right?
A. Yes.
Q. Now, you understand, as you testify today, that Professor Jarrell, were the first of those analysis only as evidence to support his alternative method of measuring damages, the revealed preference; do you understand that?
A. Yes, but I found that to be odd. I mean, I don't see how Johnson & Johnson, as an entity, through Professor Jarrell, can claim that their damages are whatever they bid. I mean, that just doesn't seem to make sense to me. It has to be the underlying economics on which they based the bids, which is the DCF.
Q. Now, am I right you didn't -- you didn't address the revealed preference argument in your expert report, right?
A. Correct. I thought the key fact was the underlying economics on which the bids were based.
Q. And now, you do it in your trial affidavit, right? You now

attack this revealed preference idea?
A. Well, Professor Jarrell, I didn't realize what a big deal he was making of it until he testified. It didn't seem to be relevant to me because the relevant question is the underlying economics.
Q. Now, I want to address something you say in paragraph 57 of your affidavit. It's a one-paragraph section, heading: The fact of J&J's bidding behavior does not provide independent evidence of Guidant's investment value to Johnson & Johnson. Do you see that?
A. Yes.
Q. Well, isn't what J&J was looking to pay for something the best evidence of what it -- how it valued Guidant?
A. Well, it's just evidence that they relied on their underlying economics. I don't see how you can use someone's bid as a measure of damages without understanding where that bid came from.
Q. Well, and that's what Professor Jarrell did, right? He used these other methods to cross check the bidding behavior, right?
A. Well, in my mind, the bid is just a reflection of the underlying investment value as contained in the workpapers that were provided.
Q. Let's anchor this to the $71 per share offer that J&J put on the table after Boston's firm offer. Are you saying that

the fact that Johnson & Johnson made a bid at 71, which was accepted by Guidant, which would have been about a $24 billion deal, is no more informative about the investment value of Guidant to Johnson & Johnson, than Johnson & Johnson's internal financial estimates standing alone?
A. It just means that the management believed the internal investment. That's why they made the bid in the first place. They looked at the assets, they valued what they thought they were worth to them, and determined what they would be willing to bid on that basis, I presume.
Q. Well, isn't the fact that Johnson & Johnson committed to pay about $24 billion to acquire Guidant proof positive that J&J placed a value on Guidant of at least $24 billion?
A. Assuming they were rational agents, yes.
Q. So absent some evidence of irrelevant rationality by Johnson & Johnson, a multi-billion dollar, multi-national corporation, that would be proof positive that Johnson & Johnson placed a value on Guidant of at least $24 billion; isn't that right?
A. I think so.
Q. Now, you know --
A. At that time.
Q. I'm so sorry?
A. At that time, at the time they made the bid.
Q. Now, the fact that J&J's DCF valuation changed over time

and was sensitive to changes in the inputs to the model, the DCF model doesn't change the fact that at the end of the process, Johnson & Johnson committed to pay almost $24 billion for the company; isn't that right?
A. It doesn't change that, no.
Q. The same is true also of Johnson & Johnson's planned bid of $75 per share; isn't that right?
A. Same is true. They did an analysis and, you know, concluded at that point they could bid 75. Though, it's somewhat ironic because a month earlier they said 63 was top dollar, and no further good news about Guidant.
Q. And I'm going to come back to that in just a little bit. Now, assuming the evidence shows that Johnson & Johnson was prepared to pay $75 per share, the fact that J&J's DCF valuation was sensitive to changes in the inputs of the model doesn't change the fact that J&J valued Guidant in an amount of at least $75 per share at that point in time?
A. It doesn't change the conclusion of what J&J was valuing it at, no.
Q. Do you have a term, sir, for -- I'm going to buy something for $8 and it's worth $11 to me, but I'm going to get it for 8. Do you have a term for the three bucks' difference?
A. That's commonly called consumer surplus, in economics.
Q. What would you call it in M and A? I'm going to buy it for X dollars a share, and I think it's worth, to me, three bucks

more than that. What's the three bucks there?
A. What I often call it is wishful thinking, but I'm being a little humorous. That's the expected value you hope to achieve by undertaking the transaction or to earn for yourself.
Q. I'm trying to -- if I use expected value -- I just want to use a term that a doctor would use, doctor in economics.
A. Well, the word expected, if it's your expectations, it's your hope or value creation from the transaction.
Q. One of my smarter colleagues suggested, expected net present value. Would that be a phrase?
A. Okay. That's commonly referred to as that.
Q. I just want to make sure I understand.
A. But expected with respect to the individual doing the forecasting because some other individual might forecast it differently.
Q. All right. Well, if you'll turn to paragraph 41 of your trial affidavit, I want to spend a little time on this particular paragraph. There is actually a reference to expected net present value there; do you see that?
A. Yes.
Q. Okay. So what this section of your affidavit analyzes, J&J's estimates of Guidant's investment value and how they changed over time, is investment value another way; would you say?
A. Investment value is there. The value of the investment to

them, that's what I think is meant in the context of these things.
Q. Well, I just want to make sure we get our terms right. Maybe we should stick with expected net present value?
A. Well, the expected net present value is 3.7.
Q. Right. And that's going to be, I'm going to pay X and it's worth Y, and the difference is the 3.7 billion?
A. Yes. I think it's worth Y. My current projections tell me that it's worth Y, to me. Just to be clear.
Q. Understood. Got it.
A. Because the payment is known. The other thing is based on projections.
Q. All right. Now, as I understand, this is the first paragraph in this section, but what you're doing here is putting down where J&J was on its estimates as of the date of the initial merger agreement in December of 2004, right?
A. Yes.
Q. And the DCF value that J&J had come up with was approximately 27.6 billion; do you see that?
A. Yes.
Q. And the expected net present value to J&J, if it acquired Guidant at 76 bucks, was 3.7 billion; do you see that?
A. I do.
Q. And, you know, that expected present value -- withdrawn. Withdrawn.

I'd like now to turn to the next paragraph, when you fast forward in time. And for the record, there are a couple of words at the end of that that are in the original paragraph, just carry it over to the next page. Just so you understand what's on the screen is missing words after that sentence, but we're going to come to them next. It's just a carry-on sentence to the next page.
A. Okay.
Q. Okay. So 11 months later, at the time of the amended merger agreement, you note that the DCF estimate has dropped about 13 percent to 24 billion; do you see that?
A. Yes.
Q. Now, I looked for it, but I didn't see your analysis of the change in the net expected -- excuse me, the expected net present value to J&J as of the amended merger agreement. Is that in your report?
A. Might be in the exhibit. I don't think it's in the text.
Q. Okay. Is there some reason why you included it for the initial merger agreement but didn't include it when you went to the next date?
A. Not that I can think of. The point I'm making here is just the change in the valuation. So it's not really relevant to this point that I'm making.
Q. In other words, the point you're trying to make is that their estimate of the value of Guidant -- that Guidant's value

had decreased by 13 percent, from the 27.6 billion number to the $24 billion number, right?
A. That's the point I'm making, yes.
Q. Do you know whether the expected net present value to J&J declined proportionate to that?
A. You know what, I think, as I recall, it declined. It may have declined proportionally. It didn't go to zero. This was still the positive net present value. I don't remember the number. It may be in an exhibit.
Q. You'd agree with me that that could be an important number, right? Because there could be a scenario where, even though the value of the thing I'm buying is less, to me, I think it's worth more or maybe even more than I thought it was worth before my net expected net present value?
A. If the market price dropped more than your valuation, your expected net present value could go up.
Q. Well, you cite as authority for this sentence, these Korbich Exhibit No. 10; so I'd like to call that up, please. Now, this is a presentation to the J&J board of directors. I'm just -- let's stay on this page for a second, Marco, just to orient the witness.
Are you with me, Professor?
A. I'm with you. I'm just doing something else, too. I'm multitasking here.
Q. I think you're looking in your affidavit?

A. Because I was curious. I said I thought this was in an exhibit, and so I'm also going through my affidavit, but I'm ready. I see what you have.
Q. I would be, with the Court's indulgence, I'd be happy to see if you could find that in your trial affidavit somewhere.
A. Yeah, if you look at Exhibit 9 in my trial affidavit.
Q. Okay. Exhibit 9? Okay.
A. And look at Line 3.
Q. Okay. So --
A. So there are all the MPV's as well.
Q. Right. Well, why don't we come back to this, and then I think I'll link it back to your exhibit.
A. Okay.
Q. But the MPV, you put it in for December of '04 into the text, but for November of '05 we're going to have to go back to Exhibit 9, right?
A. Yes, and for the other dates as well.
Q. Okay. So this is a document you relied on for the sentence we just analyzed, in November 2005 declined in the value of Guidant. And so this is the cover page, and I want to flip to the page that you cited, which is unreadable, unfortunately. But we're not going to do anything with it other than have me note that it's Page 4547, which is the specific pin is cite in your affidavit.
What I want to do now is look at the next page, the

page right after this, and this is the bridge of valuation changes. And if you see, at the time of signing, the net present value as calculated by J&J was $3.6 billion. So I think it's a little different than your report, but that's what's on this document. And then if you look at November 1st, 2005, the net present value is higher, isn't it?
A. That's exactly what's in Exhibit 9, yes.
Q. Right. In Exhibit 9 but not in the text of your affidavit, right?
A. Right.
Q. And so what happened here, it wasn't a proportionate drop or something like a proportionate drop. In fact, as of the amended merger agreement, Johnson & Johnson was getting a better deal, right?
A. They dropped. As I said, this can happen even though the valuation went down. Their offer went down more, so the MPV went up.
Q. Without getting into too much detail on the pluses and minuses, there are several minuses, things that have happened to the company, and there are estimates of what that is. But you see the reduced purchase price, right?
A. That's exactly what I just said, yeah, it can happen.
Q. Right. So in the section -- so we've established that as of November 2005, we know from reading the text of your affidavit, Guidant's -- Johnson & Johnson's estimate of

Guidant's valuation has declined, but we know from Korbich 10 and from being directed now to Exhibit 9 of your affidavit, that it was a better deal for Johnson & Johnson by a billion-and-a-half dollars; isn't that right?
A. According to their projections, yes.
Q. Right. Well, you used -- withdrawn.
Now, if we could go back to the carryover paragraph in the affidavit. I believe it's still paragraph 42. Right. There we go. There are those words that I was looking for before. So the next entry here, the next date you focus on is two months later, where the DCF estimate of Guidant's value has decreased further, and that now it's down to 22.8 billion, and drifted up a few days later.
And once again, we'd have to go looking in Exhibit 9 for the data point that you included for the initial merger agreement, but did not include for either November of '05 or January of '05, meaning the net estimated present value, right?
A. If you wanted to see the MPV, which really wasn't what I was talking about there, yes, you'd have to go to Exhibit 9.
Q. Now, here you cite to Darretta 22; so I'd like to call that up, and I think your point is, over time, the Guidant value had declined by quite a bit. I think you make that point in paragraph 42. We'll come to that.
A. The estimated value by Johnson & Johnson had declined quite a bit.

THE COURT: You keep saying that. Is there an intrinsic value that is measurable some other way, or are we stuck with what people thought it was worth at that time?

THE WITNESS: Well, there is a Guidant market price throughout this period until it stops trading. That's why I keep saying -- I want to distinguish these various concepts, the market price, the value projected by J&J, and the value that could have been projected by anyone else, such as stockholders.

Whenever I buy a stock, I do a DCF or I do my own projections. So I just want it to be clear that when he's talking about this, he's talking about a set of projections prepared by one entity and what that leads to.

THE COURT: All right.

BY MR. COFFEY:

Q. Well, so in Darretta 22, it's cited by you, and I'm not going to ask you, but I could not find in here the support for the sentence you cited, the precise for -- it may be my problem, but I do want to take you to the same bridge valuations changes in this report that's on January 10, 2006.

And, here, the board is being apprised -- a recap. There was the original MPV of 3.6, and then when they renegotiated the deal at 63, it was 5.1. And then again, they have mostly subtractions but, nonetheless, as of January 10, they still think -- withdrawn.

The 64.30 is, you understand, to be the current value of the J&J consideration because the stock price of J&J has gone up? Let me back that up. You're aware that J&J was prepared to pay part in cash and part in stock?
A. Yes.
Q. And we've been using the $63 shorthand because that was the value as of the date of the amended merger agreement?
A. Yes.
Q. And as of January 10, that 63 has risen to $64.30 because of the appreciation of the J&J stock; is that right?
A. Yes, the J&J stock price moves around. The amount they're offering changes, effectively, when you convert it to dollars.
Q. Right. And here on January 10th, we still have, in J&J's view, that the estimated net present value if they were to acquire J&J -- excuse me, Guidant, is four-and-a-half billion dollars; do you see that?
A. Yes.
Q. All right. And that's still north of the net present value they were going -- they believed they were going to get if the original deal went through, right?
A. At that point, with the offer that was on the table then, yes.
Q. And the board then is informed that if, in fact, we were to increase our bid to $71, there's still $2 billion to be pocketed, as it were, or expect to be pocketed, right?

A. Expected.
Q. Right.
A. I wish it was always pocketed when I expected it.
Q. Right. And that's because often things don't work out the way you think, right?
A. Right.
Q. Projections can turn out -- the real world can turn out better, it can turn out worse?
A. Always seems to.
Q. And that's why when you do valuations, you don't peek into the future, right?
A. If you're trying to do an appraisal at a point in time, you typically do not peek into the future.
Q. Typically, or almost universally?
A. Well --
THE COURT: I'm sorry to interrupt, but that's baked into the stock price, isn't it?
THE WITNESS: Well, the stock price at a point in time, by definition, can't peek into the future because it is done then. The question is, if I'm doing an appraisal --
THE COURT: I mean, the offer price is a peek into the future, isn't it?
THE WITNESS: Well, it's a projection into the future. I think by peek into the future --
BY MR. COFFEY:

Q. Looking backwards, saying you were just talking about expecting and things don't work out the way they do, and projections are rarely spot on, right?
A. Correct.
Q. And so down the road, someone may be unhappy because the projections didn't turn out to be as rosy as they'd hoped?
A. Correct.
Q. And typically, in that kind of scenario, there's somebody who's really happy because they're on the other side of the deal and it worked out beautifully, compared to what was projected, right?
A. That's right.
Q. And that's why when we have evaluation disputes, courts take a snapshot of what the value was at the time of the deal, right?
THE COURT: I don't think he's an authority to explain why courts do what they do. Are you?
THE WITNESS: No. I was just about to say that.
MR. COFFEY: Let me rephrase that, your Honor.
BY MR. COFFEY:
Q. Valuation experts do that?
A. Not necessarily. It depends on what the legal context is, if they're testifying in the legal context.
Q. Well, in the legal context, if the instruction of the court is to value something as of a date certain, then you would

value it as of that date and not peek down the road to see what happened, right?

A. If that is the standard. And, for example, I've seen that standard used in cases where I've worked, like a minority squeeze out, where a minority shareholder got $10 for their shares and they said that wasn't fair. The Delaware Court asked for an appraisal, an appraisal was done, and that appraisal would be as of the date that the shareholders were squeezed out, and it would not peek ahead. In that context, I've seen exactly what you say.

Q. And if the minor shareholder says, look, they projected $10 a year and they made a thousand dollars a year, I should get part of that, if the appraiser goes back and says, as of the date I'm to evaluate this, to appraise it, the appraisal is reasonable, I don't look to see what happened; isn't that right?

A. In that context, you would not look to see what happened.

Q. And conversely, if the projection was $100 a year, and it worked out to be $10 a year, the person on the other side of the deal doesn't come in and say, hey, I need some money back here because this didn't work out the way I thought?

A. In that context, that's correct.

THE COURT: That's in part because they then would have been able to invest those dollars differently, if they wanted to?

THE WITNESS: Well, it's also because the minority shareholder is out. They're not going to own the stock, in any event. It's just a question of making sure that when they were taken out, they got a fair price at the time they were taken out.

THE COURT: Right, but everything that happens subsequent to that is sort of speculative, right?

THE WITNESS: And it wouldn't matter to them because they're out, in any event.

THE COURT: All right. I guess we better stop for the day. How much more do you have of this witness?

MR. COFFEY: I'm about to turn to a new area. It's going to take a while to warm up to it.

THE COURT: Let's stop. How much more do you think you have with this witness?

MR. COFFEY: I don't know because -- I would say --

THE COURT: Because I keep interrupting, is that what you're saying?

MR. COFFEY: No. This is -- I thought I knew it pretty well, but I deleted the page numbers this morning by accident. So I think I'm well over halfway.

THE COURT: So you think you have a couple more hours?

MR. COFFEY: No, I don't know. I would say an hour and change.

THE COURT: Okay. And then, Mr. Ohlemeyer, how long do you think you'd be, ballpark? I'm just trying to figure out timing tomorrow.

MR. OHLEMEYER: Thirty, 45 minutes.

THE COURT: And then after that?

MR. OHLEMEYER: We're done.

MR. COFFEY: And then we have Stoll, which we'd like to play.

THE COURT: We'd like to be wrapped up by lunch.

MR. OHLEMEYER: Yes, I still don't understand -- I don't know why we're going the stay and watch a videotape that we've all seen.

THE COURT: Yes, I'm not sure -- there's not going to be any questions. It's just to going to be seeing my reaction, a silent movie star.

MR. COFFEY: Judge, I'll speak clearly. We agreed and they agreed that we would be entitled to reopen our case and play that tape; so I don't want to hear from the other side that they don't want that now. That was part of the deal. We want to open --

THE COURT: Well, I didn't make the deal.

MR. COFFEY: I know you didn't, Judge.

THE COURT: But what is the necessity of me doing -- us doing it all together, or me promising I'll look at it later? What's the difference?

MR. COFFEY: Well, I think that as -- I think it is worth your Honor seeing this immediately on the heels of some of the testimony you heard today and yesterday, immediately, we do think. So we feel strongly about it.

THE COURT: Well, let's see where we head.

MR. COFFEY: Mr. Ohlemeyer, he can leave, but we think it would be reasonable for the Court to leave the room and begin to think about things. We'd like this to be part of the mix as you start to think about things, Judge. That's our request.

THE COURT: All right.

MR. COFFEY: And it's short. It's 20 minutes.

THE COURT: Okay. 20 minutes of Mr. Ohlemeyer's time, do you know what that costs?

MR. COFFEY: I have no comeback for that.

MR. WILSON: Only a percent of his.

THE COURT: All right. So we'll pick up again tomorrow. Professor, let me remind you, I think you probably already know, you're on cross-examination now; so don't discuss the substance of your testimony with anyone. You can talk logistics and things like that, but if you could be here ready to go by 9:30, make sure you build in a little cushion time.

THE WITNESS: The downstairs?

THE COURT: Yes, exactly.

THE WITNESS: Yes.

(Witness temporarily excused)

THE COURT: Terrific. Thanks very much. Leave everything there. We'll see you tomorrow. Okay? Thanks a lot everyone. Have a good night.

(Adjourned to December 18, 2014, at 9:30 a.m.)

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